TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 204

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WHITED & WHELESS, LIMITED, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 29, 1916.

(25372)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 542.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WHITED & WHELESS, LIMITED, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November 18th, A. D. 1915, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge:

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
versus
WHITED & WHELESS, LIMITED, ET AL., DEFENDANTS IN ERROR.

b Be it remembered that heretofore, to wit, on the 2nd day of July, A. D. 1915, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Western District of Louisiana, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2796, as follows:

United States District Court,

Western District of Louisiana.

No. 936 At Law.

UNITED STATES OF AMERICA,

versus

WHITED & WHELESS, LIMITED, ET AL.

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UNITED STATES DISTRICT COURT, FIFTH CIRCUIT,
WESTERN DISTRICT OF LOUISIANA.

UNITED STATES OF AMERICA,

versus No. 936 At Law.

WHITED & WHELESS, LIMITED, ET AL.

TRANSCRIPT

Taken by Plaintiff on Writ of Error to the
United States Circuit Court of Appeals, for Fifth Circuit.

From the

United States District Court for the Western District of Louisiana.

APPEARANCES.

Hon. George Whitfield Jack,
United States Attorney,
Attorney for Plaintiff.....Plaintiff in Error

Messrs. Alexander & Wilkinson,
Attorneys for Defendants.....Defendants in Error

1 In the District Court of the United States for the Western District of Louisiana.

United States of America,

vs. No. 936

Whited & Wheless, Limited.

The petition of the United States of America with respect represents: That Frank T. Whited, Samuel H. Dowell and John L. Scales, all residents of the Parish of Caddo, State of Louisiana, liquidating commissioners of Whited & Wheless, Limited, are, as such, justly and legally indebted to petitioner in the full sum of One Thousand and Thirty-three dollars and eighty-two cents, with five per centum per annum interest from December 12, 1898, until paid, as will hereafter more fully appear.

2.

Petitioner shows that the said Whited & Wheless, Limited, was a corporation, organized under the laws of the State of Louisiana, domiciled at Alden's Bridge, in the Parish of Bossier; that on September 4, 1913, at a meeting of the stockholders held for that purpose a resolution was adopted formally dissolving the corporation and appointing the said Frank T. Whited, Samuel H. Dowell and John L. Scales commissioners to liquidate and wind up its affairs, in accordance with the provisions of its charter; that such commissioners have not been finally discharged from their trust, but still have in their possession as such assets of the company, and are still engaged in its liquidation.

3.

That the said Whited & Wheless, Limited, operated at Alden's Bridge in the Parish of Bossier a large saw mill, and that said company, through its President, the said

Frank T. Whited, and other officers and employees, during the years of 1896 and 1898, counseled, aided and assisted one Jack Patterson, an employee of said company, fraudulently to obtain from the United States a homestead of
2 one hundred and fifty-nine and 5/100 acres of timbered land, which thereafter, by prior agreement and understanding between said Jack Patterson and the said Whited & Wheless, Limited, and the said Frank T. Whited, was transferred to the said Whited & Wheless, Limited, and later was sold by said Company to a third party, as will be hereinafter more specifically set forth.

4.

That the said Jack Patterson, at the instance of the said Whited & Wheless, Limited, and of the said Frank T. Whited, on the 14th of November, 1896, under and by virtue of the provisions of the Sections 2289 and 2290 of the Revised Statutes of the United States, filed, in the local land office of the United States at Natchitoches, Louisiana, his application (Number 6674) to enter the following land, to-wit: the Southwest Quarter of Section 3, in Township 20 North, of Range 12 West, containing 159.05 acres. That at the time of the filing by the said Jack Patterson of his application to enter the said land, and contemporaneously therewith, the said Jack Patterson likewise filed in the said local Land Office of the United States, as required by law, his affidavit and statement in writing under oath, in which, among other things, he stated and deposed that his said application to enter said lands as a homestead was honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he would faithfully and honestly endeavor to comply with all the requirements as to settlement, residence and cultivation necessary to acquire title to said lands so applied for, and that he was not acting as agent of any person, persons, or syndicate in making such entry to give them the benefit of the land entered or the

timber thereon; that he did not apply to enter same for the purpose of speculation, but in good faith to obtain a home for himself, and that he had not, directly or indirectly, made and would not make any agreement or contract in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title which he might acquire from the United States should inure, in whole or in part to the benefit of any person except himself. That there was, at the same time, paid to the Receiver of the said Land Office of the United States the sum of Thirteen Dollars and Ninety-eight Cents, the same being the amount due as fees in compensation to the Receiver of the said Land Office for the entry of said lands, for which receipt was given the said Jack Patterson by the said Receiver, and attached to, and connected with, said receipt was a notation, setting forth in detail the requirements of the law to be observed and complied with by the said defendant in order to obtain title to the said lands so applied for to be entered by him, as follows, to-wit:

"NOTE: It is required of the homestead settler that he shall reside and cultivate the land embraced in his homestead entry for a period of five years from the date of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the five years he must file proof of his actual residence, failing to do which his entry will be cancelled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land warrants upon making proof of settlement and cultivation from the date of filing affidavit to time of payment."

5.

That in order to entitle the said Jack Patterson to obtain from the United States a patent for said tract of land under the homestead laws of the United States, it was incumbent upon him to make actual settlement on said land

and to reside thereon and cultivate the same for a period of five years from the filing of his application and affidavit, hereinabove mentioned, or, in case the said Jack Patterson, did not desire to remain on said land, for a period of five years, to make payment for said land at the expiration of fourteen months from the filing of said application and affidavit, upon making proof before the Register and Receiver of the said land Office at Natchitoches, Louisiana, to a settlement upon, and cultivation of, said lands from the date of filing of his said application and affidavit down to the time of making such payment.

6.

That for the purpose of availing himself of the privilege offered by such statutes to purchase the lands embraced in his entry after the expiration of the fourteen months from the date of the filing of his said application and affidavit, the said Jack Patterson, together with his witnesses: Andy Player and Martin Stevens, appeared, on the 2nd day of September, 1898, at Benton, Louisiana, in the
4 Parish of Bossier, before B. A. Kelly, Clerk of the District Court in and for said Parish, and offered proof by himself and by the said witnesses that he had settled upon the said lands and premises and had actually resided thereon, and cultivated same, as required by the homestead laws of the United States, which depositions of the said Jack Patterson and his said witnesses were thereafter duly filed, in the said Land Office at Natchitoches, Louisiana.

7.

That the said Jack Patterson in his said deposition testified that during the month of November, 1896, he built a house on the land and established his actual residence thereon; that said house, with out-house, fencing and clearing, was worth about $50, and that he, his wife and three children resided in same continuously from the establishment

of his residence to the time of making final proof, and that he had not been absent, except to get work as a laborer to assist in making a living. That he had cleared four acres, and raised one crop; that the depositions of his witnesses, Andy Player and Martin Stevens, taken before the said B. A. Kelly, Clerk of Court, as aforesaid, were to the same effect as that of the said Patterson, and corroborative thereof.

8.

That the Register and Receiver accepted said depositions and the sworn statements of the said Jack Patterson and his witnesses as full proof of his settlement and residence on said tract of land, and cultivation of the same, and, thereupon, on the 12th day of September, 1898, the Receiver of the said Land Office issued receipt No. 20654 to the said Jack Patterson for One Hundred and Ninety-eight Dollars and Eighty-one Cents, being payment for said lands at the rate of $1.25 per acre, and the Register of the said Land Office likewise then and there issued to the said Jack Patterson, certificate No. 20654, certifying that Jack Patterson had purchased said land and that upon presentation of said certificate to the Commissioner of the General Land Office he should be entitled to receive a patent therefor; and, that thereafter, towit: on the 12th day of December, 1898, a patent was accordingly issued to the said Jack Patterson for said lands.

5 9.

Plaintiff states that the said depositions and sworn statements of the said Jack Patterson and his said witnesses were each of them false and fraudulent to the knowledge of the said Jack Patterson and his said witnesses, and to the knowledge of the said Whited & Wheless, Limited, and its President, the said Frank T. Whited, and the same were made with intent to deceive, and did deceive the officers of the United States, and with intent by fraud and deceit to procure a patent to said land by means of such false and

fraudulent testimony and statements contained in said depositions, in this, to-wit: That the said Jack Patterson built only an uninhabitable pole pen on the said land which had no floor or chimney, and that he did not establish his residence and live in same with his family as alleged, but stayed there only two or three nights during the fourteen months during the commutation of his homestead entry; that he planted a small crop of corn or peas around the house, but never harvested the same.

10.

That the said Whited & Wheless, Limited, paid said entry fee, and thereafter paid for the said Jack Patterson the full price on the commutation of the homestead; that at the time of the making of said entry, the understanding between the said Jack Patterson, and the said Whited & Wheless, Limited, through its President, was, that the said company should pay all expenses and should get said land, and more particularly the timber thereon, in accordance with such agreement, the land, after patent, was, on December 12th, 1898, deeded to the said Whited & Wheless, Limited.

11.

Plaintiff states that but for such fraud and deceit practiced on the Register and Receiver of said Land Office by the said Jack Patterson and by the said Whited & Wheless, Limited, and the said Frank T. Whited, such hometsead entry would not have been allowed and such patent would not have been issued to the said Jack Patterson, and the said land would have been saved to petitioner and would
6 have remained a part of its public domain; that by reason of the allowance of such homestead entry and the patent to the asid Jack Patterson, petitioner, has been wrongfully and illegally deprived of said land by the wrongful, fraudulent and illegal acts of the said Jack Patterson and the said Whited & Wheless, Limited, and the said Frank T. Whited, and is now entitled to recover the value of same from the said Commissioners appointed to liquidate

the affairs of the said Whited & Wheless, Limited, and from the said Frank T. Whited, in solido with said Commissioners.

Petitioner states that at the time of the issuance of said patent to the said Jack Patterson, (December 12, 1898) and at the time of the deed from the said Jack Patterson to the said Whited & Wheless, Limited, September 24, 1898, said land was well worth the sum of $6.50 per acre, or a total of One Thousand and Thirty-three Dollars and Eighty-two cents for the 159.05 acres.

12.

WHEREFORE, premises considered, petitioner prays that the said Frank T. Whited, Samuel H. Dowell and John L. Scales, commissioners appointed to liquidate the affairs of the said Whited & Wheless, Ltd., and the said Frank T. Whited, personally, be duly served each with a copy of this petition and cited to answer hereto, and that after all due delays and legal proceedings had, petitioner do have and recover judgment against Frank T. Whited, Samuel H. Dowell and John L. Scales, as liquidating commissioners of the said Whited & Wheless, Limited, and against Frank T. Whited, in solido, in the full sum of One Thousand and Thirty-three Dollars and Eighty-two Cents with 5% interest per annum from December 12, 1898, until paid. Prays for all further orders necessary or needful and for costs, and for general relief.

GEO. WHITFIELD JACK,
United States Attorney.

ENDORSED: No. 936. United States District Court, Western District of Louisiana. United States vs. Whited & Wheless, Limited, et al. PETITION. Suit for $1,033.82 with 5% int. from Dec. 12, 1898; being value of 159.05 acres of land. Jack Patterson tract. Filed Dec. 29, 1914, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

7 No. 936.

United States District Court,
Western District of Louisiana.
United States of America,

vs.

Whited & Wheless, Limited, et al.

In this case now comes Frank T. Whited, individually made defendant herein and without answering to the demands of the plaintiff, excepts thereto and for cause of exception says:

1: That plaintiff's petition sets forth no cause of action or right to recover for the matters and things therein set forth.

2: That even if said petition did set forth a cause of action that the same is barred and prescribed by the prescription of six years, which this defendant specially pleads and this court therefore has no right to hear, or consider, the matters and things set forth in plaintiff's petition.

WHEREFORE, he prays that said exception be sustained and plaintiff's suit be dismissed at its cost, and for general relief.

ALEXANDER & WILKINSON
Attorneys.

I HEREBY CERTIFY that the above exception is filed in good faith and not for the mere purpose of delay.

J. D. WILKINSON
Attorney.

ENDORSED: No. 936. United States vs Whited & Wheless, Ltd. et al. EXCEPTION AND DEMURRER ON BEHALF OF F. T. WHITED. Filed Feb. 15, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

8 No. 936

United States District Court
Western District of Louisiana.
United States of America

vs

Whited & Wheless Ltd. et al.

This case coming on to be heard on the exception and plea filed herein by Frank T. Whited and after due hearing thereof, the law and the evidence being in favor thereof, it is ordered, adjudged and decreed that said exception be sustained and the suit of the plaintiff be dismissed at its cost.

DONE, READ and signed in open Court on this the 18th day of February, 1915.

ALECK BOARMAN.
Judge.

ENDORSED: No. 936: United States vs. Whited & Wheless, Ltd. et al. JUDGMENT sustaining Exception of Frank T. Whited. Filed Feb. 18-1915. Leroy B. Gulotta, Clerk U S District Court, West. Dist. of Louisiana.

9 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

TUESDAY, Shreveport, La., December 29-A. D. 1914.

Court met pursuant to adjournment and was ordered opened.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: G. W. Jack, United States Attorney:

Present: U. S. Marshal: By L. B. Lea, Deputy.

Present: Leroy B. Gulotta, Clerk.

United States

vs. No. 936.

Whited & Wheless, Limited, et al.

Now into Court comes the United States, through its attorney, G. W. Jack, Esq., and files Petition against Whited & Wheless, Limited, et al, of Caddo Parish, praying to recover judgment in the sum of $1033.82.

It is ordered that Court adjourn until 10 o'clock tomorrow morning.

10 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

MONDAY, Shreveport, La., February 15th, A. D. 1915.

This being the Third Monday of February, A. D. 1915, and by law the first day of the February, 1915, term of the United States District Court for the Western District of Louisiana, for the Shreveport Division, at Shreveport, Louisiana, the same was duly opened by the Marshal.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: G. W. Jack, United States Attorney.
Present: Robert A. Hunter, Asst. U. S. Attorney.
Present: J. H. Kirkpatrick, U. S. Marshal.
Present: J. M. Grimmet, Chief Deputy U. S. Marshal.
Present: Yancy Collins, Deputy U. S. Marshal.
Present: Leroy B. Gulotta, Clerk.

United States of America,

vs. No. 936.

Whited & Wheless, Limited, et al.

Exception and Demurrer on behalf of F. T. Whited, filed by his attorneys, Messrs. Alexander & Wilkinson; and on Motion of Mr. G. W. Jack, United States Attorney, IT

IS ORDERED, that the said Exception be set down for Wednesday, February 17, 1915, for hearing.

Exception on behalf of Liquidators of Whited & Wheless, Limited, filed by their attorneys, Messrs. Alexander & Wilkinson, and on Motion of Mr. G. W. Jack, United States Attorney, IT IS ORDERED, that the said Exception be set down for hearing on Friday, February 19th, 1915.

It is ordered that Court adjourn until 10 o'clock tomorrow morning.

11 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

WEDNESDAY, Shreveport, La. February 17th, A. D. 1915.

Court met pursuant to adjournment and was ordered opened.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: G. W. Jack, United States Attorney.
Present: Robert A. Hunter, Asst. U. S. Attorney.
Present: J. H. Kirkpatrick, U. S. Marshal.
Present: J. M. Grimmet, Chief Deputy U S Marshal.
Present: Leroy B. Gulotta, Clerk.

United States of America,
vs. No. 936.
Whited & Wheless, Limited, et al.

This case came on this day for hearing according to previous assignment in the matter of the Exception and Demurrer heretofore filed by Frank T. Whited, one of the defendants herein. Mr. G. W. Jack, U. S. Attorney, appearing for the United States, and Mr. J. D. Wilkinson, appearing for the Exceptor and defendant, and was argued by counsel and submitted and decision rendered sustaining the Exception.

It is ordered that Court adjourn until 10 o'clock tomorrow morning.

12 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

THURSDAY, Shreveport, La. February 18th. A. D. 1915.

Court met pursuant to adjournment and was ordered opened.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: Robert A. Hunter, Asst. U. S. Attorney.

Present: U. S. Marshal: By J. M. Grimmet, Chief Deputy.

Present: Leroy B. Gulotta, Clerk.

United States of America,

vs. No. 936.

Whited & Wheless, Limited, et al.

In this cause, on Motion of Mr. J. D. Wilkinson, of counsel for Frank T. Whited, one of the defendants herein, the following Judgment is signed sustaining Exception and Demurrer filed by the said Frank T. Whited, herein.

JUDGMENT.

This case coming on to be heard on the Exception and Plea filed herein by Frank T. Whited, and after due hearing thereof, the law and the evidence being in favor thereof, it is ordered, adjudged and decreed that said exception be sustained and the suit of the plaintiff be dismissed at its costs.

DONE, READ AND SIGNED in open court on this the 18th day of February, 1915.

ALECK BOARMAN
Judge.

It is ordered that Court adjourn until 10 o'clock tomorrow morning.

13 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

SATURDAY, Shreveport, La. May 1st. A. D. 1915.

Court met pursuant to adjournment and was ordered opened.

Present and Presiding: Hon. Aleck Boarman, U S Judge.

Present: G. W. Jack, United States Attorney.

Present: Robert A. Hunter, Asst. U. S. Attorney.

Present: U. S. Marshal: By J. M. Grimmet, Chief Deputy.

Present: Leroy B. Gulotta, Clerk.

United States

vs. No. 936.

Whited & Wheless Limited, et al.

In this case now comes the plaintiff, the United States herein appearing by its attorney, Mr. G. W. Jack, United States Attorney, and presents to the Court a Petition for a Writ of Error and assignment of errors, and, thereupon, the following order is signed and filed granting said writ of error to the U. S. Circuit Court of Appeals for the Fifth Circuit.

ORDER.

The foregoing petition for Writ of Error in the above case (with assignment of errors attached) to the United States Circuit Court of Appeals for the Fifth Circuit considered, it is ordered that such writ of error be granted and allowed as prayed for, and that a transcript of the record and proceedings herein duly authenticated be filed in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans; and that all further proceedings in

this case be suspended until the determination of said writ of error by said Circuit Court of Appeals.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 1st day of May, 1915.

ALECK BOARMAN
United States Judge.

It is ordered that Court adjourn until Monday morning 10 o'clock.

14 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

United States of America,

vs No. 936

Whited & Wheless, Limited, et al.

To the Honorable Aleck Boarman, Judge of the United States District Court for the Western District of Louisiana:

Now comes the United States, by Attorney, and respectfully shows:

That on the 17th day of February, 1915, this case coming on to be heard on exception of no cause of action and plea of the statute of limitations herein filed by defendant Frank T. Whited, judgment was rendered sustaining said exception and plea against petitioner, dismissing this suit; which judgment was duly signed February 18, 1915.

Your petitioner, finding itself aggrieved by the said judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue in its behalf to the United States Circuit Court of Appeals aforesaid sitting at

New Orleans in said Circuit for the correction of the errors complained of and herewith assigned, and that all further proceedings be suspended until the determination of said writ of error by the Circuit Court of Appeals.

GEO. WHITFIELD JACK.
United States Attorney.

15 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

United States of America.

vs No. 936

Whited & Wheless Limited. et al.

ASSIGNMENT OF ERRORS.

Now comes the United States, plaintiff in error in the above case, and, in connection with its petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and upon which petitioner relies to reverse the judgment entered herein, as appears of record;

(1) The court erred in sustaining the exception of no cause of action or right to recover on the allegations set forth in plaintiff's petition;

(2) The court erred in holding that the action was barred and prescribed by the prescription of 6 years (Statute of Limitations) plead by the defendant Frank T. Whited.

WHEREFORE plaintiff in error prays that the judgment in this case be reversed and the case remanded for further proceedings.

Respectfully submitted,

GEO. WHITFIELD JACK.
United States Attorney
Counsel for Plaintiff in Error.

16 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

United States of America.

vs No. 936

Whited & Wheless Limited. et al.

ORDER.

The foregoing petition for writ of error in the above case (with assignment of errors attached) to the United States Circuit Court of Appeals for the Fifth Circuit considered, it is ordered that such writ of error be granted and allowed as prayed for, and that a transcript of the record and proceedings herein duly authenticated be filed in the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans and that all further proceedings in this case be suspended until the determination of said writ of error by said Circuit Court of Appeals.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 1st day of May, 1915.

ALECK BOARMAN.
United States Judge.

No objection to form.
J. D. WILKINSON.

ENDORSED: No. 936: United States District Court, Western District of Louisiana. United States vs Whited & Wheless Ltd. et al. PETITION of U. S. for Writ of Error; ASSIGNMENT OF ERRORS: and ORDER THAT WRIT BE GRANTED AND ALLOWED AS PRAYED FOR. Filed May 1-1915. Leroy B. Gulotta, Clerk U S District Court, Western District of Louisiana.

* * * * * * * *

21 UNITED STATES DISTRICT COURT,
Western District of Louisiana.

United States of America

versus No. 936 at Law.

Whited & Wheless Limited et al.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of said Court:

The Clerk will please prepare transcript of the record under the order allowing writ of error in this case and copy therein the following documents:

Petition.

Exception filed by defendant, F. T. Whited.

Judgment.

Petition and Order allowing Writ of Error.

Assignment of Errors.

Writ of Error.

Citation of Appeal (Original)

Præcipe for Transcript.

Certificate of Clerk.

GEO. WHITFIELD JACK
United States Attorney.

ENDORSED: No. 936. United States District Court, Western District of Louisiana. United States of America versus Whited & Wheless Ltd et al. PRAECIPE FOR TRANSCRIPT. Filed Jun 7-1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

22 CLERK'S CERTIFICATE.

United States of America

United States District Court, Fifth Circuit,

Western District of Louisiana.

CLERK'S OFFICE:

I, LEROY B. GULOTTA, Clerk of the United States District Court for the Western District of Louisiana, DO HEREBY CERTIFY, that the above and foregoing 21 pages contain and form a full, true, complete and perfect transcript of the record and proceedings had in a case entitled:

United States of America

v.

Whited & Wheless Limited, et al.

Number 936 At Law, on the docket of said Court, said transcript being made up in accordance with the Præcipe of the Plaintiff, Plaintiff in Error, filed herein on June 7th, 1915, a copy of said Præcipe being included in said Transcript.

WITNESS my hand and Seal of Office, at the City of Shreveport, Louisiana, on this the Twenty-third day of June, A. D. 1915.

(Seal) LEROY B. GULOTTA,
Clerk.

By E. C. JACKSON,
Deputy Clerk, United States District Court,
Western District of Louisiana.

21 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION.

Extract from the minutes of March 28, 1916.

No. 2796.

THE UNITED STATES OF AMERICA
versus
WHITED & WHELESS, LTD., ET ALS.

On this day this cause was called, and, after argument by George Whitfield Jack, Esq., United States Attorney, for plaintiff in error, and J. D. Wilkinson, Esq., for defendants in error, was submitted to the Court.

OPINION OF THE COURT.

Filed April 15th, 1916.

22 United States Circuit Court of Appeals, Fifth Circuit.

No. 2796.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WHITED & WHELESS, LTD., ET AL., DEFENDANTS IN ERROR.

Error to the United States District Court for the Western District of Louisiana.

Before Pardee and Walker, Circuit Judges, and Maxey, District Judge.

BY THE COURT:

This is a suit to recover from the purchasers of the patentee the value of lands alleged to have been fraudulently patented.

23 The defendants in error excepted to the petition on two grounds, (1) that the petition set forth no cause of action or right to recover for the matters and things set forth; and (2) that even if the petition did set forth a cause of action, the same was barred and prescribed by the prescription of six years.

These exceptions were sustained in the lower Court and judgment rendered accordingly.

The error alleged in this writ is that the Court erred in sustaining the exceptions.

The Act of March 3, 1901, provides, among other things, that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act; and suits to vacate and annul patents hereafter

issued shall only be brought within six years after the date of the issuance of such patent."

The patent involved in this case was issued the 12th day of
24 December, 1898; this suit was brought December 29th, 1914.

We are of opinion this statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. United States v. Chandler, 209 U. S. 447; United States v. Winona & St. Peters R. R. Co., 165 U. S. 467. See United States v. Exploration Co., 190 F. 405; United States v. Smith, 181 F., 545; Kansas City Lumber Co. v. Moores, 212 F., 153.

If the patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is just about the same as if there had been no fraud practiced upon the Government and as if the patent had been properly, legally, and fairly issued.

Judgment affirmed.

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25 JUDGMENT.

Extract from the Minutes of April 15, 1916.

THE UNITED STATES OF AMERICA

No. 2796. *versus*

WHITED & WHELESS, LTD., ET ALS.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

PETITION FOR WRIT OF ERROR, AND ORDER ALLOWING SAME.

Filed June 20, 1916.

26 In the United States Circuit Court of Appeals, Fifth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

No. 2796. *Vs.*

WHITED & WHELESS, LTD., ET AL., DEFENDANTS IN ERROR.

PETITION FOR WRIT OF ERROR.

Now comes the United States, plaintiff in error herein, and says that on or about the 15th day of April, 1916, this court entered a

judgment herein in favor of the defendants and against this plaintiff, in which judgment there was error greatly to the prejudice and injury of the plaintiff in error, as will more fully appear by the assignment of errors, which is filed herewith.

Wherefore, the plaintiff in error prays that a writ of error may be allowed in said cause from the Supreme Court of the
27 United States and that proper orders for the allowance of such a writ be made by this Court.

(Signed) GEO. WHITFIELD JACK.
United States Attorney.

ORDER.

The foregoing petition for a writ of error in the above numbered and entitled cause (with assignment of errors attached) to the Supreme Court of the United States, considered, it is ordered that such writ of error be granted and allowed as prayed for, to operate as a supersedeas.

Thus done and signed this 19th day of June, 1916.

(Signed) DON A. PARDEE,
Judge, United States Circuit Court of Appeals, Fifth Circuit.

In the United States Circuit Court of Appeals, Fifth Circuit.

28 UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

No. 2796 *Vs.*

WHITED & WHELESS, LTD., ET AL, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS.

Now comes the United States of America, plaintiff in error, through its undersigned attorney, and in connection with its petition for a writ of error herein, presents this, its assignment of errors, and says that the judgment entered herein on the 15th day of April, 1916, is erroneous in the following particulars, to-wit:

I.

The court erred in holding that the plaintiff's petition set forth no cause of action.

II.

The court erred in holding and deciding that the plaintiff's right of action was barred by the statute of limitations.

29 III.

The court erred in affirming the action of the district court.

Wherefore, plaintiff in error prays that the judgment herein complained of be reversed and corrected, and that it may have an adjudication and judgment in its favor, and that said cause be remanded for further proceedings according to law.

(Signed) GEO. WHITFIELD JACK,
United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the
30 pages numbered from 21 to 29 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2796, wherein The United States of America is plaintiff in error, and Whited & Wheless, Limited, et al., are defendants in error, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record number from 1 to 20 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of June, A. D. 1916.

[SEAL.] FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

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31 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between The United States of America, plaintiff in error, and Whited & Wheless, Limited, and others, defendants in error, a manifest error hath happened, to the great damage of the said United States of America,

as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 20th day of June, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by

DON A. PARDEE,
U. S. Circuit Judge.

32 CLERK'S OFFICE.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendants in Error.

Dated this 26th day of June, A. D. 1916.

[SEAL.] FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

(Indorsed:) No. 2796. United States Circuit Court of Appeals, Fifth Circuit. The United States of America, Plaintiff in Error, *vs.* Whited & Wheless, Limited, et al., Defendants in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed June 26, 1916. Frank H. Mortimer, Clerk.

33 THE UNITED STATES OF AMERICA,

The President of the United States to Whited & Wheless, Ltd., Frank T. Whited, Samuel H. Dowell and John L. Scales, Commissioners appointed to liquidate the affairs of Whited & Wheless, Ltd., and Frank T. Whited, personally; greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a Writ of Error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein The United States of America is plaintiff in error and Whited & Whe-

less, Ltd., Frank T. Whited, Samuel H. Dowell and John L. Scales, Commissioners appointed to liquidate the affairs of the said Whited & Wheless, Ltd., and the said Frank T. Whited, personally, are defendants in error, said cause bearing the number 2796 on the docket of the United States Circuit Court of Appeals of the Fifth Circuit to show cause, if any there be, why the judgment rendered against the said United States of America and in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 24th day of June in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

DON A. PARDEE,
United States Circuit Judge.

34 Service of the within citation of appeal accepted and acknowledged this 22nd day of June, A. D., 1916.

ALEXANDER & WILKINSON,
Attorneys of Record for Defendants in Error.

(Indorsed:) No. 2796. United States Circuit Court of Appeals, Fifth Circuit. United States of America, Plaintiff in Error, *vs.* Whited & Wheless, Ltd., et als, Defendants in Error. Citation. U. S. Circuit Court of Appeals. Filed Jun 26 1916. Frank H. Mortimer, Clerk.

(Indorsement on back:) File No. 25,372. U. S. Circuit Court Appeals, 5th Circuit, Term No. 542. The United States, Plaintiff in Error, *vs.* Whited & Wheless, Limited, et al. Filed June 29th, 1916. File No. 25,372.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, *Plaintiff in error*,
v.
WHITED & WHELESS, LIMITED, *et al.* } No. 204.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In this case the United States brought an action at law on December 29, 1914 (R. 9), against the liquidators of Whited & Wheless, Limited, and Frank T. Whited individually, to recover $1,033.82, the value of 159.05 acres of public land in Louisiana which had been patented as a homestead to Jack Patterson on December 12, 1898 (R. 7), together with interest at 5 per centum from that date.

The action is founded upon the alleged fraud of the defendants and the homestead entryman, Patterson, in that the entry was made by Patterson at the instance of Frank T. Whited, president of the company, for the benefit of the company and pursuant to a prior agreement to procure the land for the

company; that Patterson never resided upon or cultivated the land and never intended to do so; that false proofs of residence and cultivation were made by Patterson which deceived the Government land officers and induced the patent; that the company paid all of the expenses of Patterson in procuring the patent, including $1.25 per acre to the Government under the commutation provision of the homestead law; and that on December 12, 1898, the date of the patent, in accordance with the unlawful agreement, Patterson conveyed the land to the company (R. 3–9).

The defendants demurred to the petition on two grounds (R. 10):

1. That plaintiff's petition sets forth no cause of action or right to recover for the matters and things therein set forth.

2. That even if said petition did set forth a cause of action that the same is barred and prescribed by the prescription of six years, which this defendant specially pleads and this court therefore has no right to hear or consider the matters and things set forth in plaintiff's petition.

This demurrer was sustained in general terms by the District Court without an opinion (R. 11). The Court of Appeals affirmed the judgment on the ground that the cause of action was barred by the statute of limitation (R. 21–22). The Government brings the case here by writ of error (R. 23).

Opinion C. C. A. (R. 21–22), 232 Fed. 139.

The statute which was held to bar the action is the first sentence of section 8 of the act of March 3, 1891 (26 Stat. 1095, 1099), which reads as follows:

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

SPECIFICATION OF ERROR.

Error in holding that the cause of action was barred by the statute of limitation.

QUESTIONS PRESENTED.

1. In the absence of limitation the Government may sue either to annul the patent or to recover the value of the land.

2. The right to recover the value of the land is not affected by the Limitation Act.

3. The measure of value is not the minimum Government price.

ARGUMENT.

I.

In the absence of limitation the Government may sue either to annul the patent or to recover the value of the land.

In the early case of *Fenemore* v. *United States*, 3 Dall. 357, the United States commissioner for settling continental accounts had been induced by means of false vouchers to issue a certificate of indebtedness, and it was held that the Government, acting through the Attorney General, could affirm the transaction

and recover the value of the certificate. Upon this important question each of the Justices expressed himself to the same effect, as follows (pp. 363–364):

> CHASE, Justice: The judgment of the circuit court ought to be affirmed. Here is a case of a plain fraud. A man sets up a claim, exhibits colorable vouchers to support it, deceives the public officer, obtains a certificate that his claim is just, and finally converts that certificate into transferable stock. The transaction is rank from the beginning to the end; and the jury have properly found not only the fraud but the value of the certificate obtained by it. The United States, by adopting the present mode of proceeding, have precluded themselves from ever disputing hereafter the validity of the certificate; and they will never, perhaps, be able to indemnify themselves against the subsequent payments of interest, unless Fenemore remains solvent and accessible to legal process. But, surely, it ought never to have been a subject of argument in a court of justice whether, on stating a manifest fraud practiced upon the public credit and Treasury, the United States is entitled to recover an equivalent for the pecuniary injury from the avowed delinquent.
>
> IREDELL, Justice: I am clearly of the same opinion. Upon strict technical rules, I had, at first, some doubts, whether the inconsistence of the counts in the declaration would not be fatal; but on the appearance of the rule entered into by consent, for the very purpose of obviating objections on that ground, my mind was perfectly satisfied. The only ques-

tion, therefore, that remains to be decided, turns upon the right of the United States to affirm the original transaction; and if they have that right, it follows inevitably that they ought to recover from the defendant an equivalent for the value of the certificate, which was surreptitiously obtained. I have no difficulty in saying that the right exists; and that the public interest involved in the credit of a public paper medium, required the exercise of the right in a case of this kind. The circulation of the certificate should be unimpaired; but the defendant ought at least to be made responsible in his purse for the fraud. The defence is, indeed, an extraordinary one; it is an attempt to make the very act of fraud an instrument or shield of protection. But I trust no man will ever be able to defend himself in an American court of justice, upon the ground of his own turpitude. As, therefore, every exception to form has been obviated by consent, and as the special verdict finds every material fact to justify the judgment of the court below, I think that judgment ought to be affirmed.

CUSHING, Justice: The cause is susceptible of little doubt. The United States had a right to affirm the original transaction, and to proceed, as they have done, for the recovery of the value of the certificate and the interest.

ELLSWORTH, Chief Justice: Giving a reasonable effect to the rule, which the parties themselves have entered into, all objection as to the form and inconsistencies of the declaration, is obviated. Then, it is to be considered that

the United States had an option, either to affirm or disaffirm the original contract; and by the present action they have chosen to affirm it. The special verdict fairly authorized the court below to give judgment for the value of the certificate, on the first and second counts, and for the amount of the money received as interest, on the third count. With respect, however, to the right of disaffirmance, I wish to be understood as limiting it to the continuance of the certificate in the hands of the original party; for, if the certificate had passed into the hands of a bona fide purchaser, even a court of equity would, I think, refuse to invalidate it; and I am sure public policy would forbid the attempt.

PATERSON, Justice: As I joined in giving the judgment of the Circuit Court, it gives me pleasure to be relieved from the necessity of delivering any opinion on the present occasion. But th ugh I have no doubt on the case now t be decided, it appears to me, to be another and a great question, how far a bill in equity would reach all the points involved in the original transaction.

The auth ty of the Attorney General to make this election of remedies results from his general authority to sue in behalf of the United States upon all just grounds that are available to private individuals. In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279, in ruling that the Attorney General needed no specific authority to enable him to

bring suit to cancel a patent obtained by fraud, the court by Mr. Justice Miller said:

> If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument. The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be a party, and that this means mainly where it is a party plaintiff is a necessary result of the well-established proposition that it can not be sued in any court without its consent. There must, then, be an officer or officers of the Government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of

> law, of an instrument which injuriously affects its rights of property, or other rights, it can not bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases, while all other just grounds of suing in a court of justice concededly belong to the Department of Justice, and are in use every day?

A demonstration of the availability of both these remedies to the Government is found in the fact that where one of them can not be enforced without injury to third parties resort may be had to the other—that is, where the land has passed to an innocent purchaser its value may still be recovered. Such was the case of *Southern Pacific* v. *United States*, 200 U. S. 341, 352, where the court by Mr. Justice Brewer said:

> Erroneously and by mistake the officers of the Government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to parties who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyance and reestablish in himself the title, but he may recover of his vendee the

> value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser.

To the same effect are *Cooper* v. *United States* (C. C. A., 9th Circuit), 220 Fed. 867, 870; *United States* v. *Koleno* (C. C. A., 8th Circuit), 226 Fed. 180, 182; *United States* v. *Frick* (D. C. California, N. D.), 244 Fed. 574, 580; *Bistline* v. *United States*, 229 Fed. 546, 548.

The doctrine of these cases is that the right of the Government to sue for the value of the land embraced in a fraudulent patent is not dependent upon but exists independently of the right to sue for annulment of the patent.

II.

The right to recover the value of the land is not affected by the Limitation Act.

The language of the Act is (26 Stat. 1095, 1099):

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

There is nothing in this language to indicate an intention to do more than to bar the right to recover the land. To extend it by ordinary implication beyond its plain import would be to disregard the settled rule, founded upon a "great principle of

public policy," that the United States "are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville &c. Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Insley*, 130 U. S. 263, 265–266; *United States* v. *Amer. Bell Tel. Co.*, 159 U. S. 548, 554.

Examples of restrictive interpretation of this statute are not lacking. Thus, although it applies in general terms to "suits brought by the United States to vacate and annul any patent," it has been held not to apply to a patent erroneously issued under a railroad grant for Indian land; *Nor. Pac. Ry. Co.* v. *United States*, 227 U. S. 355, 367; or to an Indian allotment patent inadvertently issued to one not entitled to an allotment; *La Roque* v. *United States*, 239 U. S. 62, 68; and its application to approvals and certifications which are given the effect of patents has been doubted. *Louisiana* v. *Garfield*, 211 U. S. 70, 77.

The situation which called for this statute discloses its singleness of purpose. The Act of March 3, 1887 (24 Stat. 556), for the adjustment of land grants, resulted in a large number of suits to cancel patents which had been erroneously issued. This produced a general feeling of uncertainty respecting the stability of the titles to public lands and tended to cast discredit on all public land patents. It was to settle such titles and restore the public faith in patents of the United States that the limitation

clause was inserted in the Act of 1891. See House Report 253, Fifty-fourth Congress, first session.[1] The language of the Act is well adapted to accomplish that result, and that result can be fully accomplished without in any manner affecting the right to sue for the value of land procured by fraud.

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[1] This report accompanied H. R. 5474, which, with some amendments, became the Limitation Act of March 2, 1896 (29 Stat. 42). The report begins with the following statement:

"On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the act of March 3, 1891. Under the act of March 3, 1887 (24 Stat. L., 556), the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable, and whenever it was ascertained that lands had been erroneously patented the law provided that actions should be brought to cancel the same.

"Provisions are embraced in the act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

"These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

"In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the Limitation Act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years, or prior to March 3, 1896, and that as to patents subsequently issued, suits to cancel the same should be brought within six years after the date of the patent."

By appropriate language to meet a different situation Congress might have barred both classes of suits; and this it has done in a specific instance with respect to certain lieu land patents. The Act of March 2, 1896 (29 Stat. 42), which replaced the Act of 1891 in some respects, provided:

> That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, *nor shall recovery be had for lands or the value thereof*, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Here the language of the first part of the section is similar to the Act of 1891, but, with respect to a particular limited class of lieu land patents, it is provided "That no suit shall be brought or maintained, nor

shall recovery be had for lands or the value thereof." The insertion of the words "or the value thereof" was clearly intended to cut off both remedies in this limited class of cases, and if the same thing had been intended in all cases it would naturally have been so expressed in the first part of the section. This is an indication of the understanding of Congress that in order to bar the right to recover the value of land procured by fraud or mistake it is not enough to bar the right to recover the land.

Such "subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 309, and cases cited.

In the confirmation by limitation act of fraudulent patents for the single purpose of settling land titles there is nothing inconsistent with the recognition of continued right to redress on account of the fraud.

A private owner who has been defrauded of his property may, within the limitation period, elect to confirm the transaction and recover the value. He does the same thing in effect when he delays action beyond the time limited by law for recovery of the property, if at that time his right to recover the value be not also barred. In that event, though the title be confirmed, the value may still be recovered. As Chief Justice Parker said in *Lamb* v. *Clark*, 5 Pick. 193, 198:

> If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.

In *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 224, the court said:

> If the original owner of the property elect to sue for the property, or for damages for the conversion, the action will be barred by the statute of three years. Code, sec. 2773. But if the party elects to sue for the value of the property, the action will be barred in six years. Code, sec. 2775. It is true, as argued, that a wrongdoer may obtain a title to the property by three years adverse possession, and yet be liable for three years after his title is perfected to pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for property or its value. During six years his right to sue for the value is as perfect as his right to sue for the property within three years.

To the same effect see *Ivey's Adm'r* v. *Owens*, 28 Ala. 641, 649; *Ganley* v. *Troy City Nat. Bank*, 98 N. Y. 487, 494; *Robertson* v. *Dunn*, 87 N. Car. 191, 194; *Campbell* v. *Holt*, 115 U. S. 620, 625; *Hardin* v. *Boyd*, 113 U. S. 756, 765.

Upon these decisions we take it as settled law that where there are two periods of limitation, one fixing the time within which suit must be brought to recover property obtained by fraud, and the other fixing a longer time for a suit to recover the value of property so obtained, and no action to recover the property is taken within the shorter period so that the title is confirmed in the wrong doer, yet the value may still be recovered by the injured party in a suit brought

within the longer period. The law should be the same, of course, if, instead of a longer period for recovery of the value, there were no limitation upon that right of action.

The right of the Government to relief against fraud by every appropriate remedy is not less than that of the individual. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279. In a case of fraud, it is entitled to "all the remedy which the courts can give"; *United States* v. *Minor*, 114 U. S. 233, 241; including election between different remedies; *Fenemore* v. *United States*, 3 Dall. 357, 363; and the pursuit of one after another is no longer available. *Southern Pacific* v. *United States*, 200 U. S. 341, 352.

All of the lower Federal courts which have had to consider this question, except in the present case, have sustained the right of the Government to sue for the value of land obtained by fraud, after the land itself has been put beyond recovery by the limitation statute.

In *United States v. Jones* (D. C., Oregon, Dec. 21, 1914), 218 Fed. 973-975, District Judge Wolverton said:

> It is contended that the statute bars not only the remedy, but the right, and therefore no other right of action will lie for recovery on account of the fraud perpetrated in acquiring title to the lands. The effect of the statute is tersely stated by Mr. Justice Holmes, in *United States* v. *Chandler-Dunbar Co.*, 209

U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), as follows:

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605 (17 L. Ed. 261); *Sharon* v. *Tucker*, 144 U. S. 533 (12 Sup. Ct. 720, 36 L. Ed. 532); *Davis* v. *Mills*, 194 U. S. 451, 457 (24 Sup. Ct. 692, 48 L. Ed. 1067). This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476 (17 Sup. Ct. 368, 41 L. Ed. 789)."

And in a later case—*Louisiana* v. *Garfield*, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92—it is said:

"In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447 (28 Sup. Ct. 579, 52 L. Ed. 881), it was decided that this act applied to patents, even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy, but validated the patent."

In other words, the running of the statute has the effect to vest in the patentee a perfect title to the land. Very true, but the statute is concerning suits to vacate and annul patents, and comprises but one remedy. That remedy having lapsed, the patent is validated, and the

title becomes perfect in the holder under the patent. The language does not give it broader scope or operation.

It is settled law that the general Government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound. *United States* v. *Insley*, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. The United States, like an individual, may have more than one right of suit or action growing out of the same transaction, and there exists no good reason why the Government may not waive or avail itself of its remedies in like manner as can an individual. The point is well illustrated by the case of *Southern Pacific Co.* v. *United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507, wherein it appears that the Government, through mistake, patented to the railroad company quite a large body of land, which subsequently passed into the hands of innocent purchasers. The Government sued to recover the value of the land, and the suit was sustained. In disposing of the case, Mr. Justice Brewer, speaking for the court, says:

"When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party, purchasing in good faith, the original owner is not limited to a suit to cancel the conveyance and reestablish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The convey-

ance to the innocent purchaser is equivalent to a conversion of personal property."

If the Government may sue to recover the value of lands procured from it through mistake, why may it not sue to recover the value of lands procured through fraud? In either case there are simply two remedies: One for the recovery of the land, where it has not passed to innocent holders, and the other for the value of the lands taken. It has its choice of remedies, and it may therefore waive one remedy and proceed upon the other. That, it seems to me, is all the Government has done in the present case. Desiring to give stability to titles depending on patent from the Government it has preferred to confirm such titles after six years in the patentee, and thereby waive any right of action it may have had for annulment of the patent; but the language of the limitations act is not susceptible of broader construction, and indicates no intendment to bar the Government of its right of action to recover the value of land obtained through fraud.

In the same case on appeal (C. C. A., 9th Circuit June 16, 1917), 242 Fed. 609, 616, the court by Circuit Judge Hunt said:

The patents involved in this action were issued in 1902, but the action was not instituted until 1912. It is said that because there is no contention that the Government failed to discover the alleged fraud within six years next preceding the commencement of the action, the right to institute a suit to avoid or annul the patents is barred, and the Govern-

> ment is without remedy in any form of action for the alleged fraud. We agree with the District Court in holding that the Government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, and that the Government may sue to recover the value of land procured from it through mistake or through fraud, waiving any right of action it may have had for annulment of the patent. *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; *State of Louisiana* v. *Garfield*, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92; *United States* v. *Pitan* (D. C.), 224 Fed. 604; *Bistline* v. *U. S.*, 229 Fed. 546, 144 C. C. A. 6; *United States* v. *Koleno*, 226 Fed. 180, 141 C. C. A., 178.

In *United States* v. *Pitan* (D. C., South Dakota, So. Dist., July 7, 1915), 224 Fed. 604, 609–610, District Judge Elliott said:

> Does this statute bar, not only the remedy, but the right, and therefore will no other right of action lie for recovery on account of the fraud perpetrated in acquiring title to the lands in question? In view of the rule above stated, that the Government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, can it be said that, by a fair interpretation of this provision of the law of 1891, Congress intended that the United States should from that time be limited, under circumstances such as are alleged in the complaint herein, to an action in equity to cancel the patent?

Clearly the United States, in common with the individual citizen, at the time of the enactment of this statute, might have more than one right of action growing out of the fraudulent acts of the defendants set forth in the complaint, and in my judgment it had the right to avail itself of its different remedies, the same as an individual. One of those remedies was the right to bring an action for damages sustained by the plaintiff by reason of the false and fraudulent representations made by the defendants, whereby the plaintiff was induced to and did part with the title to the land in question.

It is urged, however, that this remedy does not survive the expiration of the statutory period of six years named in this statute; it being conceded that while, in form, this statute only bars suits to annul the patent, by analogy to statutes of limitation generally with regard to land, it should now be held to affect the title, and that with the loss of the right to retake the title, which has been divested through the defendants' wrong, it follows necessarily that with the loss of that right the plaintiff loses the right to bring the action to recover damages for the same wrong.

I have carefully considered the language of the court in *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, and find some justification for the defendant's position; but considering the fact that the relief in that case was for the cancellation of the patent, and that the language

there used had reference only to the question of plaintiff's right to that relief, I am satisfied it was not the intention of the court to hold that it was the intention of Congress, when this statute of limitation was enacted, to extend the limitation further than its express language indicates. I am satisfied, also, that by the enactment of this statute there was no intention on the part of Congress to disturb the general governmental policy with reference to the bringing of actions generally by the United States to assert any public interest, or to enforce any public right, and that the rule with reference to such actions, including the right to bring this action for damages, is in no wise affected by the statute in question.

I am of the opinion that the sole purpose of this statute of limitation was to give stability to titles depending on patent from the Government; its effect being to confirm such title after six years in the patentee, or his assignee, and to waive any right of action it may have had for annulment of the patent, but in no manner intended to bar the Government of its right of action to recover damages for fraud, such as is alleged in the complaint herein. It follows, therefore, that this court is of the opinion that the Government of the United States has a right of action to recover damages against the defendants Henry and Pitan, sustained by it by reason of the alleged fraud of such defendants.

In the same case on appeal (C. C. A., 8th Circuit, Feb. 21, 1917), 241 Fed. 364, 366, the court, by Circuit Judge Smith, said:

> It is then contended that patents after the statute of limitations expires become absolutely good, and the plaintiff in error cites *United States* v. *Winona & St. Peter Railroad Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, and *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881. But it is elementary that one who has been defrauded may elect to rescind, or he may elect to ratify the transaction and sue for his damages. If, therefore, the Government at any time, either within or without the statute of limitations, elected to sue for damages, it must first in effect ratify the transaction, and the patent would become as valid by the Government's election as it would by virtue of the statute of limitations. It is not disputed that ordinarily the statute of limitations does not run against the Government. *United States* v. *Knight*, 14 Pet. 301, 315, 10 L. Ed. 465; *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *United States* v. *Koleno*, 141 C. C. A. 178, 226 Fed. 180, 182.
>
> The mere fact that the Government permitted the patent to become valid by the statute of limitations in place of by its express ratification would not affect the question of the right to maintain an action for damages. It was not only so held by the court below in this case, but to the same effect in *United States* v. *Jones* (D. C.), 218 Fed. 973, and there is no

decision to the contrary. This action was not barred by the statute of limitations.

In *United States* v. *Koleno* (C. C. A., 8th Circuit, Sept. 4, 1915), 226 Fed. 180, 182–183, the court, by Circuit Judge Smith, after quoting the limitation statute, said:

> The present concern is, not whether this would operate as a limitation upon an action by the Government for damages for deceit, but whether the Government had an action for deceit before this statute was passed, but which should be denied it since its passage even within the period fixed for bringing suit to annul the patent. This statute was strictly one of limitation and did not create the right to maintain an action to set aside the patent. Patents procured from the United States by fraud were never void, but voidable (*Moran* v. *Horsky*, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. Ed. 1038; *United States* v. *Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724); and it was always held that no action would lie by the United States against bona fide purchasers from a patentee for value without notice of the fraud (*United States* v. *Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724; *United States* v. *California Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; *United States* v. *Winona, etc., R. R. Co.*, 165 U. S. 463, 479, 17 Sup. Ct. 368, 41 L. Ed. 789); and it is especially pointed out in the last-named case that the defense of a bona fide purchaser existed entirely independent of any statutory provision in his behalf. If a fraud had been perpetrated upon

> the Government in the issuance of the patent it had before the statute of limitations act was passed the right of its election of remedies; it might elect to rescind the voidable patent, or it might elect to ratify it and sue for damages. The question at once arises: Who was authorized to make this election of remedies?

Quoting then from the decision in *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278, to show that this right rests with the Attorney General, the court continued (p. 184):

> This was before the statute of limitations cited was passed, and clearly corroborates the assumption that the right to maintain the action to annul a patent was not created by the statute cited, but the statute was one purely of limitation.
>
> It must be seriously contended that the Attorney General may elect to rescind the solemn act of the President or the Interior Department, but he can not make the election to ratify it and sue for damages. It seems clear that the right to do one necessarily carries with it the right to do the other, and if he can rescind he can ratify.

In *Bistline* v. *United States* (C. C. A., 9th Circuit, Feb. 14, 1916), 229 Fed. 546, 548, the court by Circuit Judge Morrow, after stating the contention of counsel based on the limitation statute, said:

> It is sufficient to say that the section has no application to the present case. This is an action at law to recover specific damages for the fraudulent acquisition of land by the defendant from the Government and for the

> subsequent fraudulent sale thereof by him to third parties. It is not a suit to vacate or annul a patent. No attempt is being made by the Government to recover the lands. They are left in the hands of the present owners. The act may not by construction be extended beyond the boundary fixed by its plain terms.

In *Union Coal & Coke Co.* v. *United States* (C. C. A., 8th Circuit, Nov. 5, 1917, not reported);[1] an "action by the United States to recover from the Coal Company the value of certain coal lands situated in Colorado, to which it is alleged the Coal Company fraudulently obtained title," the court by Circuit Judge Carland said:

> It is claimed by counsel for the Coal Company that this action is barred by the Act of March 2, 1896, limiting the time in which suit shall be brought to vacate and annul any patent to lands erroneously issued under a railroad or wagon-road grant. As was decided by this court in *Pitan* v. *United States*, 241 Fed. 364, and as appears from the act itself, the law refers to patents issued under a railroad or wagon-road grant. Counsel cites us to a statement made by this court in *United States* v. *Norris*, 222 Fed. 19, but what this court there stated was made in reference to section 8 of the Act of March 3, 1891 (26 Stat. 1099), limiting the time in which suits must be brought by the United States to vacate and annul any patent theretofore or thereafter issued. But neither of these acts by their very terms apply to suits like the one at bar. This court decided in *United*

[1] The opinion in this case is printed in the appendix.

> *States* v. *Koleno*, 226 Fed. 180, that an action like the one we are considerng would lie at the suit of the Government. *Southern Pacific R. R. Co.* v. *United States*, 200 U. S. 341. This court also decided in *Pitan* v. *United States*, *supra*, that "The mere fact that the Government permitted the patent to become valid by the statute of limitations in place of by its express ratification would not affect the question of the right to maintain an action for damages. It was not only so held by the court below in this case, but to the same effect in *United States* v. *Jones*, 218 Fed. 973, and there is no decision to the contrary." Counsel for the Coal Company for some reason not apparent cites section 1047, R. S. U. S., which limits the time within which suits to recover penalties or forfeitures shall be sustained. This is not a suit for a forfeiture or to recover a penalty. *Stone* v. *United States*, 167 U. S. 178

In the case at bar, begun in the Western District of Louisiana, the District Judge filed no opinion. The Court of Appeals (Fifth Circuit, April 15, 1916) filed a short *per curiam* opinion (R. 21), 232 Fed. 139, in which, after stating the case and quoting the limitation statute, it was said:

> The patent involved in this case was issued the 12th day of December, 1898; this suit was brought December 29, 1914. We are of opinion this statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. *United States* v. *Chandler*, 209 U. S.

> 447, 28 Sup. Ct. 579, 52 L. Ed. 881; *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 467, 17 Sup. Ct. 368, 41 L. Ed. 789. See *United States* v. *Exploration Co.* (C. C.), 190 Fed. 405; *United States* v. *Smith* (C. C.), 181 Fed. 545; *Kansas City Lumber Co.* v. *Moores*, 212 Fed. 153, 129 C. C. A. 1. If the patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is just about the same as if there had been no fraud practiced upon the Government, and as if the patent had been properly, legally, and fairly issued.

It will be observed that, although the *Jones*, *Pitan*, and *Koleno* cases were decided long prior to the date of the opinion in this case, none of those cases were cited by the court. A brief filed by the United States attorney shows that the court's attention was directed to the *Jones* and *Pitan* cases.

It is next to be observed that all of the cases cited by the court, except the *Moores* case, 212 Fed. 153, were suits to cancel patents, and therefore could not involve the question of right to recover the value of the land, as pointed out in the *Jones* and *Pitan* cases, *supra*. The *Moores* case, cited by the court, did not involve any statute of limitation, and it is not seen how that decision touches any aspect of the question under consideration. As to the cases of *United States* v. *Exploration Co.*, 190 Fed. 405, and *United States* v. *Smith*, 181 Fed. 545, cited by the court, they had been reversed on the point to

which they were cited in *United States* v. *Exploration Co.*, 203 Fed. 387 (now on appeal in this court, docket No. 277), and *Linn & Lane Timber Co.* v. *United States*, 203 Fed. 394, affirmed 236 U. S. 574.

It is evident that the decision of the Court of Appeals in this case was founded entirely upon the following expression of this court in the case of *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 450:

> This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place.

Applying this language, the Court of Appeals said (R. 22, 232 Fed. 140):

> If the patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is just about the same as if there had been no fraud practiced upon the Government and as if the patent had been properly, legally, and fairly issued.

No fraud was involved in the *Chandler-Dunbar* case, and the opinion shows that the language quoted was not intended to apply to a case of fraud, for immediately following it is this observation:

> We waste no time upon suggestions of bad faith on the one side or the other, as there is no sufficient warrant for them, and as they were touched rather than pressed at the argument.

The suit was brought to remove a cloud on the title upon the theory that the patent "was void and hence was no patent," because the land had been reserved. But it appearing that the land "was public land of the United States and in kind open to sale and conveyance through the Land Department," it was held that the patent was susceptible of validation, and having been validated by the statute, it should be taken as valid from its inception—not in the sense that fraud if it existed would be condoned, but in the sense that the patent could not be treated as a nullity and disregarded.

It was also said in that case (209 U. S. 450):

> In form the statute only bars suit to annul the patent. But statutes of limitation, with regard to land, at least, which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S. 533; *Davis* v. *Mills*, 194 U. S. 451, 457.

"The right" here mentioned as distinguished from "the remedy" is taken to mean the right to the land, that is, the title. This is evident from the authorities cited. In *Leffingwell* v. *Warren*, 2 Black, 599, 605, the point decided was that the lapse of time limited by statute for reentry "vests a perfect title in the adverse holder." In *Sharon* v. *Tucker*, 144 U. S. 533, 544, it was held that such an adverse holder could maintain a bill in equity to establish his title. And in *Davis* v. *Mills*, 194 U. S. 451, 456, it was said, referring to the right as distinct from

the remedy, that "as to land the distinction amounts to nothing." None of these cases in any manner touch the question whether there may exist a right of action to recover the value of land obtained by fraud independently of the right to recover the land.

III.

The measure of value is not the minimum Government price.

The homestead law, under which the patent in this case was issued, gives to each qualified entryman a tract of not more than 160 acres, upon condition that he shall honestly and in good faith enter upon the land for the purpose of actual settlement and cultivation, not for the benefit of any other person, but to obtain a home for himself, and thereafter reside upon and cultivate the land for five years. Upon payment of the minimum price of $1.25 per acre, the period of residence and cultivation may be commuted to 14 months. In any case proof of the faithful performance of these conditions by sworn testimony is required. Act of March 3, 1891 (26 Stat. 1098).

In this case entry was made by Patterson at the instance of Whited and for the benefit of the Whited & Wheless Company to obtain the land for it pursuant to a prior agreement, which was afterwards carried out by false testimony and conveyance to the company, and $1.25 per acre was paid to the Government under the commutation provision.

This was a fraud upon the United States and involved the commission of perjury. *Bailey* v. *Sanders*, 228 U. S. 603, 608; *Causey* v. *United States*, 240 U. S. 399, 401.

This offer of the Government to accept $1.25 per acre under these conditions has no reference to actual value. The conditions themselves imply that the land is much more valuable than the price so fixed. The offer is made to home seekers in pursuance of a great and beneficent public policy upon specified and onerous conditions. To say that the Government has not been injured because it has received its price, though the conditions be not fulfilled, is to say that the conditions are without value or real purpose, and that their circumvention by fraud and perjury is of no consequence.

A case exactly in point is *Pitan* v. *United States* (C. C. A., 8th Circuit), 241 Fed. 364. It was there held under a state of facts like the present that the Government could recover the actual value of the land, and the court said (p. 366):

> The Government is not seeking to sell its lands for the highest price they will fairly bring. It is seeking to give homesteads to the people, and to do this with very little reference to whether it realizes the value of the lands or not.

And again (p. 367):

> As already stated, the Government has never sought to obtain the actual value of lands from purchasers. In this very case it did not

> offer the land for sale at 50 cents an acre, but agreed that it would accept 50 cents an acre and the prior occupancy and improvement of the land by Bertha E. Henry. It is now claimed that the Government could be cheated out of the prior occupancy and improvement, and be compelled to take some arbitrary sum, which it has fixed to receive in cash, as its full measure of damages. We have seen that the Government is entitled to the same rights as a private individual when defrauded.

See also *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170.

In support of the contention that the Government has not been injured by this fraud, counsel for defendants in error refer to the Limitation Act of March 2, 1896 (29 Stat. 42). That Act provides with reference to patents "erroneously issued under a railroad or wagon road grant" in section 2:

> That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed.

This provision is so obviously inapplicable to a suit for damages on account of fraud in procuring a homestead patent that discussion is needless. The same suggestion was made in the *Pitan* case, and the court said (241 Fed. 365):

> In the first place, the context of this quoted portion shows that the statute in question had reference wholly to land grants to railroads and wagon roads. In the second place, while it may be conceded that, while the land procured by fraud is "erroneously patented," it is much more. It is not only erroneously patented but it is fraudulently procured to be patented.

In the similar case of *United States* v. *Frick* (D. C., California, N. D.), 244 Fed. 574, 580, District Judge Van Fleet said:

> The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the Government, $2.50 per acre, and in that regard relies upon the provisions of the act of March 2, 1896 (29 Stat. at L., 42, 43), entitled, "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes"; but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent has issued erroneously. It does not affect cases proceeding like the present on the theory of fraud in

> the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the Government is not to be permitted to benefit by his misdoing; that, having deprived the Government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived.

To the same effect are *Cooper* v. *United States* (C. C. A., 9th Circuit), 220 Fed. 867, 869; *Union Coal & Coke Co.* v. *United States* (C. C. A., 9th Circuit), unreported. See appendix.

The exact measure of relief to which the Government is entitled—whether the amount already paid by the entryman should be allowed to the defendants and whether interest should be allowed to the Government—is not now involved and may well be left for future determination.

CONCLUSION.

The judgment of the Court of Appeals and the District Court should be reversed and the case should be remanded to the District Court with directions to overrule the demurrer and permit the defendants to answer.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

MARCH, 1918.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

No. 4844.—SEPTEMBER TERM, A. D. 1917.

THE UNION COAL AND COKE Company, a corporation, *plaintiff in error*, *v.* THE UNITED STATES OF America, *defendant in error*.	In error to the District Court of the United States for the District of Colorado.

Mr. W. W. Anderson for plaintiff in error.

Mr. Eugene B. Lacy, assistant United States attorney (Mr. Harry B. Tedrow, United States attorney, was with him on the brief), for defendant in error.

Before Carland, Circuit Judge, and Amidon and Munger, District Judges.

CARLAND, Circuit Judge, delivered the opinion of the court.

This is an action by the United States to recover from the Coal Company the value of certain coal

lands situated in Colorado, to which it is alleged the Coal Company fraudulently obtained title by conspiring with certain individuals to make coal land entries for its benefit, when it had already received the benefit of sections 2347–51 R. S. U. S., authorizing the disposal of public coal lands.

We agree with the trial court that the undisputed evidence showed that coal land entry No. 313, made February 3, 1903, in the name of William F. Oakes, for lots one and two, section 19, Township 29 S., R. 65 W., containing 84.4 acres, for which patent issued June 26, 1903, was made by Oakes for the benefit of the Coal Company. We are also satisfied that the same is true as to the subsequent entry of Westlake. The Squier entry becomes immaterial, as no recovery was had in regard to that. The other questions in the case are questions of law. The demurrers to the complaint were properly overruled. If the Coal Company desired the pleader to specify in what respect it was not qualified to enter, purchase, or hold coal lands, it should have made a motion to that effect, as a demurrer was not the proper remedy.

The trial court ruled that although the Coal Company was entitled under sections 2347 and 2348 R. S. U. S., to 320 acres of coal land, it could make but one coal-land entry, and that if in making this entry it did not claim the amount of coal land to which it was entitled, nevertheless, it could not make a subsequent coal-land entry. We think this ruling was right in view of section 2350 R. S. U. S., which reads in part as follows:

> The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold

any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions.

It is not contended that Westlake could not enter coal lands for the Coal Company in the absence of evasion as to quantity (*United States* v. *Colorado Anthracite Company*, 225 U. S. 219), but that the Coal Company having received the benefit of the entry made by Oakes could not make another entry either itself or by an agent. There is nothing in the case cited opposed to this view. The restriction to one entry found in section 2350, *supra*, must be given full effect. To decide that an individual or an association could make several coal land entries, provided the total amount of land filed upon did not exceed the maximum allowed by the statute, would be to read out of section 2350 the words "Only one entry." *United States* v. *Keitel*, 211 U. S. 370–388.

It is claimed by counsel for the Coal Company that this action is barred by the Act of March 2, 1896, limiting the time in which suit shall be brought to vacate and annul any patent to lands erroneously issued under a railroad or wagon-road grant. As was decided by this court in *Pitan* v. *United States*, 241 Fed. 364, and as appears from the act itself, the law refers to patents issued under a railroad or wagon-road grant. Counsel cites us to a statement made by this court in *United States* v. *Norris*, 222 Fed. 19, but what this court there stated was made in reference to section 1 [8] of the Act of March 3, 1891 (26 Stat. 1099), limiting the time in which suits must be brought by the United States to vacate and annul any patent theretofore or thereafter issued. But neither of these acts by their very terms apply to suits like the one at bar. This court decided in *United States* v. *Koleno*, 226 Fed. 180, that an action

like the one we are considering would lie at the suit of the Government. *Southern Pacific R. R. Co.* v. *United States*, 200 U. S. 341. This court also decided in *Pitan* v. *United States, supra*, that "The mere fact that the Government permitted the patent to become valid by the statute of limitations in place of by its express ratification would not affect the question of the right to maintain an action for damages. It was not only so held by the court below in this case, but to the same effect in *United States* v. *Jones*, 218 Fed. 973, and there is no decision to the contrary." Counsel for the Coal Company for some reason not apparent cites section 1047, R. S. U. S., which limits the time within which suits to recover penalties or forfeitures shall be sustained. This is not a suit for a forfeiture or to recover a penalty. *Stone* v. *United States*, 167 U. S. 178. The judgment below is *affirmed*.

Filed November 5, 1917.

A true copy.

Attest:

[SEAL.] E. E. KOCH,

Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 204.

UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

vs.

WHITED & WHELESS, LTD., ET AL.,
DEFENDANTS IN ERROR.

Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICUS CURIAE.

The writer is solicitor for the appellant in the case of *Exploration Company, Limited,* v. *United States,* No. 277 at the present term. That case involves the application of the limitation statute of March 3, 1891, providing that "suits to vacate and

annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents" (26 Stat., 1099, 1093) to suits brought after the expiration of that period to secure the vacation of patents upon the ground of alleged fraud. We do not propose herein to discuss the effect of the statute upon such a suit, but lest that question may become involved in this case to the prejudice of the *Exploration Company's* appeal soon to be argued, we respectfully refer to our brief filed or about to be filed in that proceeding for a discussion of the subject.

The two cases are, however, more or less analogous, and we deem it important to present our views upon the following question:

After a suit to vacate a patent is barred by the statute, may the government maintain an action at law for damages against the original patentee, based upon his alleged fraud in procuring the patent, and where the property has not passed into the hands of a *bona fide* purchaser?

I.

While a patent may be directly annulled in a suit brought within six years from its date, nevertheless so long as it remains uncancelled there is a conclusive presumption that the laws under which it was issued were complied with and that the patentee was lawfully entitled thereto. It cannot be collaterally attacked.

Patents to public lands are granted by the Land Department in pursuance of statutory authority and such patents generally recite, we believe, that they are

issued after compliance with law. They are solemn evidence that such laws have been observed. They may, of course, be directly attacked for fraud, but neither the qualification of the patentee nor his compliance with the statute can be impeached except in such a direct proceeding to annul the instrument. These principles have been repeatedly stated by this court.

> "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained."
>
> *Johnson* v. *Towsley,* 13 Wall., 72, 83.

> "We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the

public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

Steel v. *Smelting Co.*, 106 U. S., 447, 450.

"Upon the other hand, if the patent be for lands which the Land Department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose."

Noble v. *Union River Co.*, 147 U. S., 165, 175.

"The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (*Wight* v. *Dubois*, 21 Fed. Rep., 693) and determined that the Brick Company's original locations were valid and

that everything necessary to keep them in force, including the annual assessment work, had been done."

El Paso Brick Co. v. *McKnight,* 233 U. S., 250, 257.

"Where a patent is obtained by false and fraudulent proofs submitted for the purpose of deceiving the officers of the Government, and of thus obtaining public lands without compliance with the requirements of the law, while the patent is not void or subject to collateral attack, it may be directly assailed in a suit by the Government against the parties claiming under it."

Wright-Blodgett Co. v. *United States,* 236 U. S., 397, 403.

"The exclusion of mineral lands is not confined to railroad land grants, but appears in the homestead, desert-land, timber and stone, and other public-land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the Land Department, the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends, and that when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and, upon

a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it. * * *

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title."

Burke v. *Southern Pacific R. Co.*, 234 U. S., 669, 691.

In the light of the principles established by these cases and many others which could be cited, there is but one relief open to the United States with respect to patents issued unlawfully and through fraud, namely, a direct suit in equity to vacate the same. So long as the patent stands it is not merely an instrument of conveyance but there inheres in it an irrefutable presumption that the patentee was qualified, that he acted lawfully in making his entry, and that the Land Department proceeded according to law. This being true, how is it possible for the government to secure relief by way of damages in the face of a conclusive adjudication of regularity of which the outstanding patent is the final evidence? The case is not analogous to an action for deceit by an ordinary vendor of land against the purchaser. His deed has no effect except to convey title. It does not negative the existence of fraud in its procurement and the vendor may allow the conveyance to stand and sue for damages.

The federal courts which have recently sustained such actions at law by the United States have completely overlooked this vital distinction between the status of the government and of an individual vendor and so far as their opinions indicate this distinction has not been presented to them (*U. S.* v. *Koleno,* 226 Fed., 180, 182; *Pitan* v. *U. S.,* 241 Fed., 364, 366; *U. S.* v. *Jones,* 242 Fed., 609, 615).

The decisions of this court in *United States* v. *Minor,* 114 U. S., 233, and *Southern Pacific R. Co.* v. *U. S.,* 200 U. S., 341, do not conflict with the above views. Both cases were in equity seeking to vacate patents. In the *Minor* suit the only point determined was the right to maintain such a proceeding in equity —which we do not question. The *Southern Pacific* case largely turned upon statutes providing for confirmation of titles of *bona fide* purchasers from railroad companies and the recovery from the companies, original grantees of the government, the statutory price of the lands which had been erroneously patented to them and by them conveyed. The point we now raise was not involved or discussed in that controversy.

We believe it to be true that never until within the past few years has the United States undertaken collateral attack upon its patents by instituting actions for damages in lieu of suits in equity for annulment. It has always been supposed that the latter remedy was exclusive, particularly in view of the effect of patents not merely as instruments of conveyance but as conclusive evidence of the validity of acts upon which they issued.

II.

In any event after the lapse of six years from the date of the patent no relief can be secured by the government in any form of action founded on fraud or illegality attending its issue.

As already stated we do not in this brief discuss the application of the statute to a suit in equity to annul a patent more than six years old. The argument upon that subject is elsewhere made, and we assume for present purposes that no such direct attack could be made after the lapse of that period.

But the statute, as construed by this court, has the effect of barring any proceeding founded upon fraud or illegality in procuring the patent.

In *U. S.* v. *Chandler-Dunbar Company*, 152 Fed., 25, another form of indirect attack upon a patent was undertaken by the government. It was that the case was not "a suit to annul the Chandler patent, but only to maintain the title to these islands, and that they attack the validity of the patent only for the purpose of maintaining the title to the islands" (152 Fed., 29). The Court of Appeals said (p. 29):

> "This amounts to a contention that although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself. The proposition is too plainly untenable for argument."

This court affirmed the opinion of the court of appeals, and in so doing thus construed the limitation act of 1891 (209 U. S., 447, 450):

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it *or to validate it when made,* since the interest of the United States was the only one concerned. We can see no reason for doubting *that the statute, which is the voice of the United States, had that effect.* * * *

* * * * * * * *

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, *generally are held to affect* the right, even if in terms *only directed against the remedy.* (Citing cases). This statute must be taken to mean that the patent *is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place.*" (Italics ours.)

This decision was followed by *Louisiana* v. *Garfield,* 211 U. S., 70, 77, wherein reference was made to the *Chandler-Dunbar* case as determining "that the statute not merely took away the remedy but validated the patent."

The attitude of the Government in the present case is, in effect, that the Act of 1891 only affects *a remedy,* namely, a suit to annul a patent. If a void or voidable patent is, after the lapse of the prescribed time, "to have the same effect against the United

States that it would have had if it had been valid in the first place," and if the statute affects the right as well as the remedy, then it indubitably follows that as to any remedy the government may seek, whether by way of proceedings to cancel or an action for damages, the patent must be treated as though valid in the first instance. This carries with it the conclusive presumption that no fraud, irregularity or illegality accompanied the proceedings upon which it issued. Any other construction would permit a collateral attack where a direct attack was prohibited—a practice always frowned upon by courts of equity and of law; it would limit the scope of the statute to the *remedy*—which this court has said may not be done.

The question whether the effect of the Act of March 3, 1891, may be suspended by fraud or concealment is not presented in this case. On the contrary, the claim of the government is that this statute has no application to actions to recover the *value* of land which has been patented through fraud.

But it was the intention of Congress that this statute should apply to all forms of action affecting the substance given by the patent. It can make little difference to a patentee, or his grantee (unless the latter is still able to prove innocent purchase notwithstanding lapse of time), whether the government shall be allowed to take away his *land* or the *value* of his *land*. For all practical purposes the two are the same.

It has been the practice of the government to treat the title and its value as the same. Under the Act of March 3, 1887 (24 Stat. 556), providing for the adjustment of railroad grants, and under the sanction of general equitable principles, numerous suits have been

brought to cancel patents, in which suits, as an *incident* to the main relief sought, the value of patented lands has been recovered or prayed for to the extent they have passed into the hands of *bona fide* purchasers. In no case, until recently, has it been sought to merely recover this value as an independent matter. The case of *United States* v. *Southern Pacific R. R. Co.,* 200 U. S. 341, is one instance of the sort of suit mentioned above. It would seem, in such a suit, that if the right to obtain the principal relief, that of cancellation, were barred by law, the right to the incidental or alternative relief should likewise fail. The mere fact that this alternative relief is sought in an independent suit should not prevent the application of the legal bar which Congress created in order to put an end to litigation before time had obliterated the evidence of right.

This conclusion is alone in accord with the history of the Act of March 3, 1891, and with its practical application and interpretation by the legislative and executive departments of the government.

It was enacted in 1891 because of the uncertainty and uneasiness caused by the active investigations of the Land Department of the government into various railroad and other patents, under the mandatory instructions of the adjustment act of March 3, 1887, already referred to. Those who had purchased railroad or other granted lands desired that a time be fixed beyond which they might feel secure from further question.

As the end of the five year period fixed by the statute approached, it became evident to the Land Department that it would not be possible to complete the railroad land grant adjustments in time to file the

necessary cancellation and accounting suits before March 3, 1896, when the bar of the statute would apply.

On December 18, 1895, Commissioner Lamoreux wrote Secretary of the Interior Hoke Smith, urging that the Act of March 3, 1891, be amended so as to extend the time for such suits for ten years (*28 Cong. Rec., p. 1763; Appendix, Appellants' Br. Exploration Case*, No. 277, pp. 23-26). On December 27, 1895, Secretary Smith wrote President Cleveland urging that the statute be extended as to "railroad or other grants," or entirely repealed, because, otherwise *all* the rights of the government under the adjustment act of 1887 would be foreclosed on March 3, 1896 (28 *Cong. Rec.*, 1762-3; *Appendix, above Brief*, pp. 17-23). In neither of these letters was it suggested that the government might still recover the *value* of the patented lands.

On January 17, 1896, President Cleveland transmitted these letters to Congress together with a message in which he recommended the repeal or amendment of the Act of March 3, 1891 (28 *Cong. Rec.*, p. 1762; *Appendix, above Brief*, pp. 13-17). In this message he reviewed the activities of the Land Department in endeavoring to adjust various railroad grants and referred to that portion of the Act of March 3, 1887, allowing confirmation of titles of certain purchasers and the recovery of the *value* of the land from the patentees. He urged Congress to act before March 3, 1896, because, after that date the "ascertained rights of the United States or of settlers could not be enforced by law."

This message resulted in the passage of the Act of March 2, 1896 (29 Stat., 42), extending the time

to bring suits to "vacate and annul" railroad and wagon road patents for a period of five years longer. This act, substantially in its ultimate form, was presented to the House on February 15, 1896, by the Committee on Public Lands, together with a report urging the proposed law as an emergency measure (28 *Cong. Rec.*, p. 1760; *Appendix, above Brief,* pp. 1-13). The majority of the committee took issue with the opinion of the President that there should be no statute of limitation at all in such cases and urged that such a statute should be enacted, first, because it would spur the land officers into a more diligent investigation of patents supposed to have been improperly obtained; and, second, because after a reasonable time for investigation, "it ought not to be the policy of the Government to harass or annoy one of these settlers by *any litigation whatever.*" (Italics ours.)

In another place in this report the committee said:

> "But as to the original patentees, no great injustice will be done to them by extending the time five years longer, and within that time we think that the grants can be all adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end *all* disputes upon the part of the government as against its own patent titles is so evident as to need but little argument in its support." (Italics ours.)

In this same report, after reciting the expense, trouble and delay to which the holders of government patents of any sort may be subjected where government proceedings are delayed it is stated that the Act of 1891 was passed to "remedy these defects." There is no suggestion in the entire report, or in the debates which followed, that these patentees or their grantees were to be given merely the empty form of having their *titles* protected from delayed attack, while the substance for which these titles stood, might still be taken from them at any conceivable time in the future.

The foregoing proceedings and reports may, of course, be resorted to for the purpose of ascertaining the scope and intent of the 1891 act (*McLean* v. *U. S.*, 226 U. S., 374, 380; *Caminetti* v. *U. S.*, 242 U. S., 470, 490), even though they were connected with the related 1896 legislation (*Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S., 492, 497).

HENRY MCALLISTER, JR.,
Amicus Curiae.

JAN 19 1918
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM 1917

No. 240 204

UNITED STATES OF AMERICA
PLAINTIFF IN ERROR
versus
WHITED & WHELESS, LTD., ET AL,
DEFENDANTS IN ERROR

ORIGINAL BRIEF OF DEFENDANT IN ERROR ON THE MERITS

T. ALEXANDER
A. L. ALEXANDER
J. D. WILKINSON
Attorneys for Whited & Wheless, Ltd., et al,
Defendants in Error

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SYLLABUS.

1. In an action by the United States to recover the value of land, which it alleges was fraudulently procured under a patent from it at the price of $1.25 per acre, no cause of action or right to recover is disclosed for the

reason that the price received was the price at which it was willing to sell the land and therefore it suffered no injury, even conceding the fraud and misrepresentation as alleged to be true.

Act March 2, 1896; U. S. Stat. of 1916, Sec. 4902;
U. S. vs. Norris, 222 Fed. Rep. 14;
U. S. vs. Pitain, 224 Fed. 604;
U. S. vs. Oregon & C. R. Co., 122 Fed. Rep. 541;
S. P. Ry. Co. vs. U. S., 133 Fed. Rep. 662;
S. P. Ry. Co. vs. U. S., 186 Fed. Rep. 737;
S. P Ry. Co. vs. U. S., 200 U. S. 354;
U. S. R. S. 2357;
Sec. 3, Act March 2, 1896, U. S. Com. Stat. 1917, Section 4903.

2. Injury or damage to plaintiff as a result of fraudulent representation is a necessary prerequisite of recovery in an action for deceit.

Stratton vs. Dines, 135 Fed. 449;
Srader vs. Srader, 51 N. E. 479;
Emerson vs. Brigham, 6 Am. Dec. 109;
Freeman vs. Venner, 120 Mass. 424;
Thompson vs. Newell, 94 S. W. 557.

3. Suits by the United States to vacate and annul any patent hereafter issued shall only be brought within six years after the date of such patent.

Act March 3, 1891; Com. Stat. 1917, Sec. 5114.

4. Statutes of limitation are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. These statutes by the lapse of time become laws of repose protecting par-

ties from prosecution of stale claims, when by the loss of evidence from death of some witnesses and the imperfect recollection of others, or the destruction of documents it might be impossible to establish the truth.

Riddlesbarker vs. Ins. Co., 7 Wall. 386;
Campbell vs. Haverhill, 155 U. S. 610.

5. Statutes of limitation with regard to land at least, are generally held to affect the right, even if in terms only directed against the remedy.

U. S. vs. Chandler, 152 Fed. Rep. 25;
Sharon vs. Tucker, 144 U. S. 533;
Davis vs. Mills, 194 U. S. 451.

6 The Act of March 3, 1891, as construed by most of the inferior Federal courts bars a recovery of the price of land after the lapse of six years where the patent was obtained by fraud.

K. C. Lumber Co. vs. Morris, 212 Fed. 153;
U. S. vs. Exploration Co., 190 Fed. Rep. 405;
U. S. vs. Chandler, 152 Fed. Rep. 25;
U. S. vs. Smith, 181 Fed. 545;
U. S. vs. Norris, 222 Fed. 14;
U. S. vs. Whited & Wheless Ltd., 232 Fed. 139.

7. This Court has in effect held that this statute of 1891 is a complete bar to any suit of any nature prosecuted after the lapse of such time, for the value of the land or cancellation of the patent.

U. S. vs. Winona Ry. Co., 165 U. S. 463;
U. S. vs. Chandler, 209 U. S. 447.

8. Where a patent is obtained by fraud the United States has *one cause of action* with *two remedies* to enforce it. When its *cause of action* is barred by the statutes of limitation of 1891 *both of its remedies* are barred and it can not resort to either one.

Brasie vs. Minneapolis Brew. Co., 87 Minn. 456, 67 L. R. A. 865;
People vs. Mich. Central Ry. Co., 108 N. W. 772;
Auditor vs. Halbert, 78 Ky. 577;
Jex vs. City of New York, 13 N. Y. St. Rep. 545;
Bayles vs. Crossman, 5 Ohio Dec. 354;
Wickersham vs. Lee, 83 Pa. 422.

STATEMENT.

The plaintiff in error instituted this suit in the District Court of the United States for the Western District of Louisiana, alleging that the defendants in error were indebted to it in the sum of $1,033.82, charging that this indebtedness arose from the fact that Whited & Wheless, Ltd., operated a saw mill in Bossier Parish and through its president, F. T. Whited, and other employes, during the years 1896 and 1898, counseled, aided and assisted by one Jack Patterson, an employe of said company, fraudulently obtained from the United States a homestead entry on 159 acres of timbered land which thereafter, by prior agreement between Patterson and Whited & Wheless, Limited, was

transferred to them, and the same was later sold by the company to a third party. (R. 3 and 4.)

It charges that Patterson, at the instance of Whited & Wheless, Limited, and F. T. Whited, on Nov. 14, 1896, filed in the local land office of the United States his application to enter the land, and that at the time of filing his application he filed in the local land office his affidavit, as required by law, and that he paid to the Receiver of the Land Office the amount necessary for the entry of the land. (R. 4 and 5.)

It charges that it was encumbent on Patterson to settle on and cultivate the land, under the law, and that availing himself of the privilege offered to purchasers of land embraced in said application, after the expiration of fourteen months from the date of his application, Patterson and his witnesses appeared before the Clerk at Benton and offered proof that he had settled upon the lands and premises and had actually resided thereupon and cultivated same, as required by the laws of the United States, and which evidence so given was transmitted to the United States Land Office. The testimony given by Patterson before the Clerk, as before stated, is recited in the bill, and it is alleged that the Register and Receiver accepted these sworn statements of

Patterson and his witnesses, and on the 12th day of December 1898, issued to Patterson the final Receivers Certificate, and on the 12th day of December 1898 a patent was issued to Patterson for the land. (R. 7.)

It charges that the testimony of Patterson and his witnesses was false and fraudulent, to the knowledge of Patterson and Whited & Wheless, Limited, and to F. T. Whited, and that it was made to deceive and did deceive the officers of the United States, and with intent by fraud and deceit to obtain patent to such lands by means of such false and fraudulent testimony, reciting the truth to be that Patterson did not reside on the land and build a house on it as alleged. (R. 8.)

It is further charged that Whited & Wheless, Limited, paid the entry fee for Patterson and later paid the full price of the commutation of the homestead, and at the time of making the entry it was understood by Patterson, with Whited & Wheless, Limited, that it should pay all the expenses and should get all of the land, and more particularly the timber thereon.

It is charged that but for the fraud and deceit practiced on the Register and Receiver of the Land Office by Patterson and Whited & Wheless, Limited, and F. T. Whited,

that the homestead entry would not have been allowed and that the land would have been saved to it as a part of the public domain, and that by reason of the allowance of such entry and the patent to Patterson that it had been wrongfully deprived of the land by the fraudulent and illegal acts of Patterson and Whited & Wheless, Limited, and F. T. Whited, and that it is now entitled to recover the value thereof from them.

In paragraph three of its complaint it is charged that Whited & Wheless at some date had sold the property to a third party, but this third party is not made defendant in the case nor is he named further in the proceedings.

The defendants in error demurred to the bill on two grounds: First, that the petition set forth no cause of action or right to recover for the matters and things set forth, and, second, that even if the petition did set forth a cause of action, the same was barred and prescribed by the prescription of six years, which the defendants specially plead, and that therefore the court had no right to hear or consider the matters set forth in plaintiff's petition. (R. 10.)

This demurrer was sustained by the District Court of the United States for the Western District of Louisiana, and on writ of error to the Circuit Court of Appeals of the

United States for the Fifth Circuit of Louisiana the judgment of the District Court was affirmed. 232 Federal 139.

From the judgment of the Circuit Court of Appeals the plaintiff in error prosecutes this writ, assigning as error that the court erred in holding that its petition set forth no cause of action, and that it erred in holding that its right of action was barred by the statute of limitation. Record 23.

From the complaint it appears that on the 12th day of September 1898, Jack Patterson paid to the Register and Receiver of the United States Land Office the sum of one hundred and ninety-eight and 81-100 dollars ($198.81) in payment for the land at the rate of one and 25-100 dollars ($1.25) per acre, and that they issued to him a certificate showing that he had purchased the land and advising that upon presentation of said certificate to the Commissioner of the General Land Office he would be entitled to receive a patent theretor; and that thereafter, on the 12th day of December 1898, a patent was issued to Jack Patterson for the land.

ARGUMENT.

Plaintiff Has No Right of Action.

The exception of no cause or right of action is based on

the Act of March 2, 1896, the United States Compiled Statutes of 1916, Section 4902, reading as follows:

"If any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf af the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States Court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress."

It will be noted that the bill of complaint shows that

the property in question had been transferred to a bona fide purchaser, and that the Government is seeking to recover the value of the land from the defendant.

It will also be noted that the complaint shows that it had already received $1.25 per acre for the land, the minimum Government price thereof, and this being so it is submitted that the only recovery that plaintiff can ask is for the minimum price, and its bill, showing that it had already received that price, states no cause of action or right to recover anything more.

In the case of United States vs. Norris, 222 Federal Rep. 14, the Circuit Court of Appeals of the Eighth Circuit considered this matter and in passing on it said, referring to this statute:

"This is broad enough to include all patents erroneously or fraudulently issued under any of the Acts of Congress."

In further discussing the right to recover in that case and in passing on the effect of this statute, the Court said:

"In a suit by the government to cancel a patent for a homestead entry, commuted to a cash entry, where it appeared that the land could not be recovered because limitations had run in favor of the patentee's grantee, the government could not recover from the patentee the value of the land in excess of the amount it received therefor, especially in the absence of any evidence of such value, and, there being no competent evidence of the value of the land,

a judgment for the minimum government price of the land was the utmost that it was entitled to; it having in fact suffered no actual damage from the patentee's fraud."

Again in the case of the United States vs. Pitain, 224 Federal Rep. 604, the District Court had under consideration the effect of this statute, and in passing on it said:

"In an action for damages for fraud in obtaining a patent for a homestead entry commuted to a cash entry, the Government is entitled to recover at least the minimum government price of the land."

The court in discussing the matter concluded that the complaint in that case stated a cause of action for the minimum government price of the land; but here the complaint shows that the United States has already received the minimum price for the land, and having so received it, it states no cause or right of action to recover anything.

The same doctrine is announced in the case of the United States vs. Oregon & C. R. Co., 122 Federal 541, and in the case of the Southern Pacific Ry. Co. vs. United States, 133 Federal 662; Southern Pacific Ry. Co. vs. United States, 186 Federal 737.

The decree of the Circuit Court of Appeals in the case of the Southern Pacific Ry. Co., 133 Federal 662, was affirmed by this Court in the 200 U. S. 354; and in passing on this matter and the effect of this staute, this Court said:

"The Acts of Congress really inure to the benefit of the railroad company and restrict the right of the Government, for they provide that the recovery shall in no case be more than the minimum government price. In other words, the Government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be."

By Section 2357 of the Revised Statutes the price of public land is fixed at $1.25 per acre, and had the Government offered this land for sale it would have been willing to accept that price. This is the value which Congress has fixed on public land, and had it been sold at public sale it would have been satisfied with the receipt of that amount. Having received that amount for the land, and this appearing from its bill of complaint, it is respectfully submitted that it can recover no more.

By Section 3 of the Act of March 2, 1896, United States Compiled Statutes of 1917, Section 4903, it is provided that where it appears that a claimant of land holds it under purchase from another in good faith, that the title of such claimant shall stand confirmed.

It is then provided:

"But the Secretary of the Interior shall request that suit be brought in such cases against the patentee, or the corporation, company, person or association of persons for whose benefit the patent was issued or certification was made for the value of the land as herein before specified."

The defendant in this case certainly stands in no worse situation than Jack Patterson, the original patentee. It is clear from the statute in question that no suit could have been brought against Jack Patterson for any greater sum than $1.25 per acre, even if the claim was prescribed or if the land had passed into the possession of a bona fide third party.

It makes no difference that the defendant intended to defraud the United States, if such intended fraud did not operate to its injury.

In a number of cases the doctrine has been thus stated:

"Injury or damage to plaintiff as a result of fraudulent representatives is a necessary prerequisite of recovery in an action for deceit. (U. S. C. C. A. Colo. 1905); Stratton's Independence vs. Dines, 135 F. 449, 68 C. C. A. 161, affirming judgment (C. C. 1904) 126 F. 968;

(Ind. 1898) Srader vs. Srader, 51 N.E. 479, 151 Ind. 339;
(Mass 1806) Morgan vs. Bliss, 2 Mass. 111;
(1813) Emerson vs. Brigham, 10 Mass. 199;
6 Am. Dec. 109. And see (1852) Wellington vs. Small, 57 Mass. (3. Cush.) 149, 50 Am. Dec. 179; (1876) Freeman vs. Venner, 120 Mass. 424; (Mo. App. 1906) Thompson vs. Newell, 94 S. W. 557, 118 Mo. Ap. 405; (N. S. 1905) Sonnesyn vs. Akin, 104 N. W. 1026, 14 N. S. 248; (Va. 1887) Shoemaker vs. Cake, 83 Va. 1, 1 S. E. 287; (1894) Lake vs. Tyree, 90 Va. 719, 19 S. E. 787."

We therefore submit that the bill of complaint shows no right or cause of action for recovery, because it does not show that the complainant was damaged in any sum at all.

It is true that the allegation was made that the land in question was worth $6.50 per acre, at the time the patent was issued; but what it was worth and what the complainant would have sold it for are two different questions. Even conceding that it was worth $6.50 per acre at that time, the fact that the complainant was willing to sell it and that it could have been purchased at $1.25 per acre fixed the valuation which it put upon the land, and this congressional valuation must be taken and intended as the true valuation of the land.

Plaintiff's Right Is Barred by Limitation.

But we submit that the right to sue for the value of the land is barred by the statute of limitations provided by Act of March 3, 1891, which reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents heretofore issued shall only be brought within six years after the date of the issuance of such patents."

Before discussing the decisions considering this statute, we desire to call attention to the purposes which Congress evidently had in view in passing it.

Statutes of prescription or limitation are regarded as statutes of repose. One of the purposes which prompted the enactment of such a statute is that by the lapse of time the proof or disproof of any given state of facts becomes much more difficult. Witnesses to transactions, common experience teaches, forget them, or move away and sometimes they die. For these reasons it is not unreasonable to provide that suits to annul a patent or to recover the value of the land for fraud should be brought within six years after the date of the patent. A charge of fraud is easily preferred and oftentimes difficult to disprove, and it was evidently the purpose of Congress, in passing this statute, to require suits of this kind to be filed as early as possible, so that both the United States and the patentee might readily present their evidence pro and con.

In the case of Riddlesbarger vs. Insurance Company, 7 Wallace 386, Mr. Justice Field, as the organ of the court, in referring to statutes of limitation, said:

"They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become

statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies."

Again in the case of Campbell vs. Haverhill, 155 U. S. 610, 617, this Court, through Mr. Justice Brown, said, with reference to these statutes:

"Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this Court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses and when their recollection may be presumed to be still unimpaired. As was said of the statutes of limitation by Mr. Justice Story (Bell vs. Morrison, 1 Pet. 351, 360) 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security from stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.' "

The reasonableness of these statutes is well illustrated in this case. Mr. Wheless, who attended to this transaction, is dead, and Jack Patterson, the original patentee, has gone, and his whereabouts are unknown. Sixteen years had elapsed from the date of the patent before the institution of this

suit, and at this date it is practically impossible to locate any witnesses who were acquainted with the transaction.

In the case of United States vs. Chandler, 209 U. S. 447, the Court said:

"But statutes of limitation, with regard to land, at least, which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy." Citing a number of authorities.

The statute in this case should be held then not only to affect the remedy but to destroy the right to investigate the question whether the patent was procured by fraud or not. The right to investigate this question is barred by the statute, and without this investigation no suit can be maintained to recover the value of the land.

To permit a recovery of the value of the land in this case would be permitting the Government to ignore the statute of limitation. If a person's right to sue to recover the land itself is barred by the statutes of limitation, it appears to us that it needs no argument to show that such person could not sue to recover the value of the land, supposing that such a suit was not barred by the statutes of limitation.

We submit that the District and Circuit Courts of the United States have properly construed this statute, and we

beg to submit to the Court some of these decisions which we believe have correctly construed it.

In the case of United States vs. Exploration Company, 190 Federal 405, this question is thoroughly considered and the statute in question is construed, and in passing on this statute the Court said:

"It affects not only the remedy but the right of parties by making a patent conclusive as a transfer of title after the expiration of six years, although it may have been voidable or even void, and it seffect can not be avoided by allegations of fraud in the bill and that the fraud was concealed until after the lapse of six years."

In the case of United States vs. Winona Railroad Co., 165 U. S. 463, Justice Brewer as the organ of the Court said on this statute:

"Thus, in the Act of 1891, it (the government) provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

In the case of United States vs. Chandler, 209 U. S. 447, Mr. Justice Holmes as the organ of the Court said:

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had any authority to make it, the United States had power to make it or to validate it when made, since the interest of The United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued' it describes the purport and source of the document, not its legal effect. If the Act were confined to valid patents it would be almost or quite without use. Leffingwell vs. Warren, 2 Black 599 (17 L. Ed. 262).

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least which can not escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell vs. Warren, 2 Black 599, 650 (17 L. Ed. 261); Sharon vs. Tucker, 144 U. S. 533 (12 Sup. Ct. 720, 36 L. Ed. 532); Davis vs. Mills, 194 U. S. 451, 457 (24 Sup. Ct. 692, 48 L. Ed. 1067). This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States vs. Winona & St. Peter R. R. Co., 165 U. S. 463, 467 (17 Sup. Ct. 368, 41 L. Ed. 989)."

The Court of Appeals in the Chandler-Dunbar case, 152 Fed. 25, said in passing on this question:

"But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protec-

tion the statute creates the limitation; and if, as we think, possession is not necessary under the statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assuming it to have had any, was complete at the date of the passage of the Act, and the lapse of five years without action to annul the grant resulted in the confirmation of it."

Again the case of United States vs. Smith, 181 Fed. 545, District Judge Bean had under consideration the effect of this statute and in passing on it, said:

"As to them (eight patents) the suit is barred, for in my judgment the statute begins to run from the date of the issuance of the patent and not from the discovery of the fraud. The language of the statute is plain and leaves no room for construction. It says 'suits of the United States to vacate or annul patents shall only be brought within six years after the issuance of the patent.' The object of this statute is to extinguish any right the Government may have had in the land and vest a perfect title in the adverse holder after six years from the date of the patent, regardless of any mistake or error in the Land Department, or the fraud or imposition of the patentee."

In the case of United States vs. Norris, 222 Federal 14, the Court, construing this statute, said:

"Act March 3, 1891, c. 559, Sec. 1, 26 Stat. 1093, providing that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from the passage of that Act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the issuance of the patent,

applies to all suits by the government to vacate and annul patent to public lands issued under any law of the United States."

If the patent, by the lapse of six years, is to have the same effect against the United States that it would have had if it had been valid in the first place, as declared by the Supreme Court of the United States in the Chandler case, then the situation must be just as if there har been no fraud practiced on the government and as if the patent had been properly, legally and fairly issued. And if this was so, the plaintiff in error could not have sued either to recover the land or the value of the land. Certainly the United States could not sue a homesteader either for the land or its value where it had been fairly and legally entered and a patent had been issued without any fraud or illegality. If it could not, then by the lapse of six years from the date of the patent it is held to have the same effect that it would have had if it had been valid in the first place, and therefore the United States can not sue either to recover the land or the value of the land against a person who had fraudulently entered it when it waits until six years have elapsed.

Counsel for the Government relies on the reasoning found in the case of Pitain vs. United States, 241 Federal 364, and United States vs. Jones, 118 Federal 973. They

proceed on the theory that the Government has two causes of action, one to annul the patent, and the other to recover the value of the land conveyed, affirming the validity of the patent, whereas in fact it has but one cause of action, one right of recovery, based on the fraud and misrepresentation in obtaining the patent—with two remedies to enforce it.

The statute, by the lapse of time, absolutely destroys its cause or right of action, the fraud in obtaining the patent, and therefore destroys both remedies arising out of this cause of action.

Each remedy is based on the assertion that the patent was obtained by fraud and this fraud is merged in the patent. The price paid for the land is a part of the patent, and if it be as valid after six years, as if legally and validly issued, then the price paid and stated in the patent, is a legal and valid price and can not be attacked.

It is true that when the patentee has sold the land to a bona fide purchaser the Government loses one of its remedies, and is limited to its right to sue to recover the value of the land. But the suit is based on its cause of action and that is, that the patent was obtained by fraud. To recover

even in such case it must allege and prove the fraud and the invalidty of the patent in so far as the patentee is concerned.

In the present case, under this statute, by the lapse of time it is debarred from attacking the patent for any cause, and it can not succeed without showing the invalidity of the patent because it was obtained by fraud and false swearing.

The Government's whole case depends on the invalidity of the patent, and it must show, in order to recover, that the patent is invalid because it was obtained by fraud. It must show that the price paid was invalid, but the price, as well as the title of the land, is merged in and has become an integral and essential part of the patent itself. The Government can no more attack one than it can the other.

There is a radical difference between a case where the patentee has sold the land to a bona fide purchaser and where the patent has become incontestable by the lapse of time. The sale to a bona fide purchaser does not destroy the effect of the fraud in prcouring the patent in so far as a suit against the patentee for the value of the land is concerned; but the statute under consideration does destroy the effect of the fraud in procuring the issuance of the patent.

To illustrate the contention: under the laws of Louis-

iana the prescription of a promissory note is five years, and of an acknowledged account ten years. If the note be barred by limitation, could the creditor sue on the debt instead of the note and use the prescribed note to show an acknowledgement of the debt? Evidently not, for the reason that the debt would be merged into the note and its prescription would carry with it the prescription of the debt.

Inasmuch as the right of the plaintiff to recover in this case is based solely on the invalidity of the original patent because it was issued through fraud and misrepresentation, we submit that the door is closed to an investigation of that question by the lapse of six years. Being closed as to an investigation of the alleged fraud and misrepresentation, it can not recover the alleged value of the land.

The right of the Government to recover is barred by the statute, and this being so both of its remedies are likewise barred.

In the case of Brasie vs. Minneapolis Brewing Co., 87 Minn. 456, 67 L. R. A. 865, the Court had under consideration a similar question and in passing on the matter said:

"If it appear, either from the pleadings, or from the evidence in cases where the pleadings do not disclose the source of title, and no opportunity is presented to plead the statute, that six years had elapsed from the discovery of the

fraud before the commencement of the action, his right to have the transfer set aside is barred by the statute of limitation, and he can not recover. He can not avoid the statute by bringing an action in ejection, instead of an action to remove a cloud from his title."

In the course of the opinion in this case, discussing the statutes of limitation, the Court further said:

"The courts do not volunteer their enforcement when not insisted upon by the parties, nor refuse to apply them when properly invoked to do so; neither will the courts aid or facilitate parties in their attempt, by 'mere strategy in judicial proceedings,' or by circuitous route of action, to avoid and escape their consequences. Such statutes are applied alike to all. Yet to adopt the contentions of appellant would result in permitting him to accomplish that which he could not accomplish in any other form of action, viz.: avoid the statute. Had he brought an action direct for the express purpose of procuring a decree of the court cancelling the alleged fraudulent conveyance, he could not have maintained it, because of the bar of the statute; and there is no sound logic or reason in permitting him to effect that result in this indirect manner."

In the cited case the plaintiff attempted just what the plaintiff here is attempting to do.

In the case of People vs. Michigan Central Ry. Co., 108 N. W. 772, the Supreme Court of Michigan, in passing on a similar question said at page 774:

"So, if the law gives a choice of remedy, the one an action of assumpsit, and the other a proceeding in rem, it

should not be permitted that the statute of limitations be evaded by resorting to the latter remedy."

In the case of Auditor vs. Halbert, 78 Ky. 577, the Court in passing on a similar question said:

"The statute applies to the cause of action, the case presented by the plaintiff; and whether a particular case is embraced by the statute is to be determined by ascertaining whether it is included in the causes of action to which the statute is made applicable; and neither the form of the proceeding, nor the name by which it may be called, can have any influence on the question whether the statute applies."

In each of these cases the plaintiff sought to evade the destruction of their cause of action by the lapse of time in resorting to a remedy which was not barred by the statute, and the courts very properly held they could not do so.

In the case of Jex vs. City of New York, 13 N. Y. St. Rep. 545, the Court said:

"Plaintiff can not avoid the bar of the statute of limitation by merely changing the form of action, as it is the cause of action rather than the form which determines the applicability of the statute."

To the same effect is the case of Bayles vs. Crossman, 5 Ohio Dec. 354, and Wickersham vs. Lee, 83 Pa. 422.

The plaintiff's cause of action in this case is the fraud and perjury by which the patent was procured, at least this is the basis of its suit. It had two remedies to enforce this

cause of action, and concedes that one of its remedies is lost. But we insist that its cause of action is also lost, and this being so, both of its remedies have likewise ceased.

For these reasons we submit that the judgment of the Circuit Court of Appeals is correct, and should stand affirmed.

Respectfully submitted.

T. ALEXANDER,
J. D. WILKINSON,
A. L. ALEXANDER,
Attorneys for Defendants.